

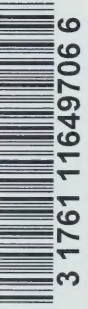
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ROYAL COMMISSION ON MATTERS OF HEALTH AND SAFETY
ARISING FROM THE USE OF ASBESTOS IN ONTARIO

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Mr. T. Lederer

Government of Ontario

180 Dundas Street
Toronto, Ontario
Wednesday,
June 30, 1982

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ROYAL COMMISSION ON MATTERS OF HEALTH AND SAFETY

ARISING FROM THE USE OF ASBESTOS IN ONTARIO

VOLUME 47

INDEX OF WITNESSES:

ARTHUR LESLIE GLADSTONE	Examination-in-chief	Page 3
	Cross-examination (Starkman)	Page 90
	Cross-examination (McCombie)	Page 111
	Cross-examination (Jolley)	Page 128

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VOLUME 47

THE FURTHER PROCEEDINGS OF THIS INQUIRY
RESUMED PURSUANT TO ADJOURNMENT

APPEARANCES AS HERETOFORE NOTED

DR. DUPRE: May we come to order, please?

This morning the Commission warmly welcomes Mr. Arthur Gladstone, some-time executive secretary of the Royal Commission on the Health and Safety of Workers in Mines, some-time executive secretary of the advisory committee on occupational health and occupational safety, currently senior policy advisor in the occupational health and safety division of the Ministry of Labour.

Miss Kahn, may I ask you, please, to swear in the witness?

ARTHUR LESLIE GLADSTONE, SWORN

EXAMINATION-IN-CHIEF BY MR. LASKIN

DR. DUPRE: Please proceed, counsel.

MR. LASKIN: Thank you, Mr. Chairman.

MR. LASKIN: Q. Mr. Gladstone, just for the record, could you tell us briefly your educational qualifications and background?

THE WITNESS: A. I was educated at McGill University, where I obtained an honors degree in history and politics, took a masters degree in history, and following that I went to the University of Degree to obtain a Master of Science degree in health care administration from the Faculty of Medicine.

Q. From the Faculty of Medicine?

A. Yes.

Q. When did you graduate from the University of Toronto?

A. When?

Q. Yes.

A. In 1976.

Q. 1976. Then can you just trace through your employment history?

A. While I was completing my thesis at the University of Toronto, I took...

MISS JOLLEY: Excuse me, could you speak just a little louder?

THE WITNESS: Sure.

I was hired by the Royal Commission on the Health and Safety of Workers in Mines, and served as its executive secretary until it completed its work in 1976, at which time I joined the Industrial Accident Prevention Association as a research associate. I left there in 1978, and joined the advisory council on occupational health and occupational safety, as assistant to the chairman, and I remained there until July, 1980, at which time I assumed my present responsibility as a senior policy advisor to the Assistant Deputy Minister, Occupational Health and Safety, Ministry of Labour.

MR. LASKIN: Q. That's Dr. Robinson?

THE WITNESS: A. Yes.

Q. Good.

5 Could we start, Mr. Gladstone, by discussing what I understand to be the internal responsibility system, and I would like to discuss it with you, if I could, in four stages.

10 What I would like to do is talk about it in such as it was, if at all, in the pre-Royal-Commission-on-the-Health-and-Safety-of-Workers-in-Mines stage. In other words, what was there before the Ham Committee?

15 Secondly, what was the system as contemplated by the Ham Commission, thirdly, what did the statute give us, and how, if at all, did it implement the recommendations of the Ham Commission, and how did it deviate, and finally, how was the system actually operating and I ask that question in light of the ministry's own experience with the system, and perhaps also in light of some of the concerns that have been expressed by Mr. Burkett in his report, and indeed by some of our own researchers in the various studies that this Commission has sought.

20 So that can we then go back to stage one, and even before we get to that, just so that we are all clear, could you tell us just in a nutshell what the term internal responsibility system comprehends?

25 A. In essence, it's the responsibility of workers, supervisors, managers, up to the company president, who are responsible for conducting their work within the framework of an organization, to do that work and all its aspects properly and safely, and to operate within a framework established by law...there have been laws in this province for almost a hundred years, dealing with health and safety in various aspects, and it sets the framework of obligations and duties that the employer, supervisor and the worker must meet, and it sets the framework

30

5 A. (cont'd.) in which there are inspectors and other groups that have responsibilities to check upon the effectiveness with which the people who have responsibilities in a company meet their responsibilities...to take action when they don't.

Q. There's two other terms which appear to have been used, and they are, number one, direct responsibility, and number two, contributive responsibility.

10 Are those constituent elements of an internal responsibility system?

A. Yes.

Q. Can you just at the outset briefly elaborate on those two terms and tell us what the differences are?

15 A. It becomes a little complex when you leave the organization itself and consider it as part of society, but if you just look at the company in and of itself, you can say that the direct responsibility is the chain of command for the performance of work, and to perform work you have to do things in a proper fashion so that people don't get hurt either from accidents or from overexposure to substances.

20 That's the direct responsibility where people are held accountable for what they do, by their fellow workers and by their supervisors.

Q. That's the direct relationship between management as represented by the supervisor, and the individual employee?

25 A. I think it's broader than that. It starts with the executive within an organization and works all the way down the chain to the worker, and it starts with the worker who finds things wrong and has to report up the chain to see that things get fixed, and when things don't get fixed, they have to do something.

Q. Okay.

5 A. Contributive responsibility is when the advisory capacity, the knowledge that exists in the work force in the managers, are channelled into a system that looks at how direct responsibility of management and labour is performing, to see that, in terms of safety for example, that the company policies and practices and the legal requirements set by statute are being met within the company, and that they channel their knowledge and
10 information into the direct responsibility system, who has the responsibility and are held accountable - either by the company itself or by law - for the protection of the people at work.

15 Q. Just jumping ahead of ourselves for just a moment, I take it that the joint health and safety committees that we have heard so much about are part of the contributive responsibility side of the internal responsibility system?

A. Yes.

Q. So, too, the worker auditor?

A. Yes.

Q. I see the Chairman...

20 DR. DUPRE: The Chairman just doesn't understand contributive responsibility yet.

What I wrote down in my lecture notes here, Mr. Gladstone, was that contributive responsibility involves the knowledge that resides in managers, is that correct? The knowledge that resides in managers as it is channelled into the system?

25 THE WITNESS: I think I started with the work force and worked up. The knowledge that exists in the work force, in the supervisors, in management, to get them all together to think about a common problem, and in this case it's safety at work and how well the people who are responsible for taking reasonable precautions to protect people are doing so.

30 So it's an external check within the system, within

THE WITNESS: (cont'd.) an organization.

5 DR. DUPRE: Okay. Let me run it past you again so that I can share either my understanding or misunderstanding.

Direct responsibility is found all the way up and down the chain of command, for the performance of work that begins with the chief executive officer and goes right down to and includes the worker doing the work. That's direct responsibility?

THE WITNESS: Yes.

10 DR. DUPRE: And the contributive responsibility involves the knowledge that is shared, or the knowledge that exists, among all of the individuals in the direct responsibility chain, is that correct? And the sharing of this knowledge so that the manner in which the chain operates is facilitated by the dissemination and sharing of this knowledge?

15 THE WITNESS: It's a way in which an organization can obtain, can organize itself so that workers and managers can meet in a forum to review how well the operation is performing its work to protect workers, and in the course of that it draws upon the knowledge that exists within those people - workers and managers - to identify problems, to make suggestions on corrections and to follow up to see that the corrections have been implemented.

20 DR. DUPRE: I guess my only problem with contributive responsibility is that it seems to be a term that involves a process as distinct from a term like direct responsibility, which to me actually tries to describe or prescribe a shared substantive responsibility up and down the line.

25 Would it be fair to say that direct responsibility involves responsibility in a substantive sense, whereas contributive responsibility refers to a process whereby the operation of substantive responsibility can be facilitated?

THE WITNESS: That would be fair to say.

DR. DUPRE: That would be fair to say.

Please, Dr. Uffen?

DR. UFFEN: I think I understand. I'll try with an example, at least to help me to understand it.

This is an actual case history, my own experience with asbestos, but it's dust.

I started out working on a machine that made a lot of dust. A little while later I was the foreman in the same shop, so I had direct responsibility to see that the machines worked properly and the people did their job as required.

But they changed the machines from the ones that I had originally worked on, slightly, and it had a different thing in it that I didn't know about that used to plug up, and the fellows who were using the new machine came and told me that this new machine plugged up.

I regarded that as a contributory responsibility of something that, in my role of foreman, I wouldn't have known about unless they told me.

Have I...is that a pertinent example?

THE WITNESS: Well, my reaction would be that that's a good example of direct responsibility - that the workers have a responsibility for informing their supervisors when something goes wrong.

DR. UFFEN: Yes?

THE WITNESS: The supervisors are, as part of their job, required to see that the problem is corrected. So that's a one-to-one relationship.

DR. UFFEN: Well, then, I'm like the chairman. I understand the direct, but I'm a little confused about the other one.

5 DR. DUPRE: Can I try this out on you, just so that you can gauge whether I'm either sinking deeper into misunderstanding, or whether I'll manage to rise to the kindergarten level?

10 Direct responsibility does indeed describe what Dr. Uffen just cited as an example, because there was a whole chain of command here, of which he was at one point as foreman, and there were workers under him, but when the workers under him informed him of how that machine was performing, they were, of course, exercising their own direct responsibility for the cleanliness, etc., of the workplace, and of course, helping him, in turn, to exercise his share of that direct responsibility as foreman, in a more appropriate fashion, correct?

15 THE WITNESS: I agree.

DR. DUPRE: Now, at this point does contributive responsibility simply refer to the following: namely, to the existence within an organization of a process that would facilitate precisely the kind of up-and-down direct responsibility on the chain that direct responsibility describes?

20 THE WITNESS: Yes. In other words, if there is a joint committee in the plant-whether it is required or not - that has as part of its responsibility as an entity unto itself to go around and check things, and in the course of checking found out that the machine was plugging up, that the workers hadn't reported it to the supervisor...or if they had, that the supervisor had said no, no, no, because the machine, when I used it, never plugged up...so he didn't investigate, he just relied on his old knowledge that was outdated. Then the committee would come in and say...the committee could say and advise the direct line of responsibility that there is a problem with that machine in that area, that the problem exists, and ask that investigations be carried out to find out what was wrong and what could be done

25

30

THE WITNESS: (cont'd.) to fix it.

So in that way, it facilitates the identification of problems and the resolution of problems.

DR. UFFEN: And just to tidy up my little illustration, in the days when we did that, the fact that we had such a consultation depended on the nature of the company and the actual shop superintendent, but nowadays it would be, under the law, required that...under the internal responsibility... required that such a procedure be available?

THE WITNESS: Which part, the direct responsibility part?

DR. UFFEN: That's a good point to clear up. The contributory...what was the phrase...responsibility. The procedure under the new Act is required.

THE WITNESS: Yes.

DR. UFFEN: Four years ago, it was not required.

THE WITNESS: Correct.

DR. UFFEN: Okay.

DR. DUPRE: Who coined those terms, direct responsibility and contributory responsibility?

THE WITNESS: Do you really want to know? I'll tell you, if you want to know who...

DR. DUPRE: Yeah.

THE WITNESS: It was a concept developed by Peter Riggan, if I'm not mistaken, in the course of his work in the field, and in discussions with Dr. Ham and as you know, Mr. Riggan was one of the commissioners in the federal/provincial inquiry into mine safety.

DR. DUPRE: I have known Mr. Riggan over the years, and in many capacities. I guess my only...the only comment I can make, which I would make to his face...is God help us.

I'm now aware for the first time that lawyers can

DR. DUPRE: (cont'd.) come up with terminology that is confusing as sociologists can come up with.

5 MR. LASKIN: I don't know why we should leave political scientists out of that.

THE WITNESS: Neither term is found within the law.

DR. DUPRE: No. But now I'm just delighted to understand and I'm sorry I've held this up, but really, I had to get this into my woolly little mind.

10 MR. LASKIN: Q. Can we now turn to the evolution of this system, and can we talk about it in, if I can call it, the Pre-Ham days, and I appreciate that the Ham Commission looked at the mining industry, but from your knowledge and from whatever information you learned from your work at the Ham Commission, can you tell us was there any type of internal responsibility system in place in Ontario before Bill 70 and before Ham, and if so, what was it? What did it look like?

15 THE WITNESS: A. The simple answer to the question is yes.

20 Q. There was a system in place? An internal responsibility system in place?

A. Yes.

Q. All right. When you say yes, does your answer extend across the whole spectrum of industry, or are you focussing on the mining industry?

25 A. No, across industry.

Q. What were the constituent elements of the system pre-Bill 70?

30 A. Well, there were three statutes that set out responsibilities. There was the Construction Safety Act of 1973, the Mining Act of 1971, and the Industrial Safety Act of 1971. If you look at those statutes, they differ slightly in how they go about the description of duties and responsibilities.

5 A. (cont'd.) You will see that they set out requirements for owners, for employers, for supervisors, for workers, for suppliers. That's the statutory framework and it's set out in requirements under regulation, and it allowed for the appointment of inspectors and required reporting of accidents.

10 Q. Did it then set out a...to use the term...a direct responsibility system?

A. Yes.

15 Q. Did it, in its statutory and regulatory framework, have a contributive responsibility element to it?

A. There were no joint health and safety committees. In terms of the participatory process, there were no committees, there were no worker representatives.

15 MR. LASKIN: Dr. Uffen?

DR. UFFEN: Just for clarification, you mean there were none required by law?

THE WITNESS: Within the statutes there were not.

20 DR. UFFEN: But there may have existed voluntary arrangements?

THE WITNESS: Correct. That's where I'm going. I'm only describing the statutory framework before 1978.

DR. UFFEN: Right.

25 THE WITNESS: I guess, if we are staying with 1978, if you want to stay pre-Ham still...?

MR. LASKIN: Q. Or pre-Bill 70.

30 THE WITNESS: A. Well, then, there was the Employees' Health and Safety Act of 1976 that instituted health and safety committees and representatives at the...if I'm not mistaken...at the order of the ministry. I would have to check that. It also gave workers the right to refuse work. Q. That statute?

5 A. Yes. And it also brought together the diverse elements of health and safety within three different ministries, into the Ministry of Labour.

That's the statutory framework, and you can trace the precedents all the way back to the Factories Act in the U.K., and Ontario started in around 1882 with its own statutes in the field, and has worked...has developed its own set of laws from then on.

10 I would also note that these preventive statutes preceeded workmen's compensation statutes in the province of Ontario.

15 Outside of this statutory framework, or within.. pardon me...within this statutory framework, which set duties and responsibilities and rights on people in the workplace, the companies, workers, organized to make products or mine things, to build things, and they set up a multitude of ways that they could organize to achieve that goal, and I think it's fair to say that within the mining sector, by the time Ham handed in his report... and I think it's noted in there...there was a very complex system of health and safety committees and worker-representative type functions within the mining industry, that were negotiated between workers and management to act as a check upon the direct responsibility system that operated within companies.

20 Different people have different estimates as to the effectiveness with which these...call them voluntary arrangements...worked, with the extent to which they worked, to the need for them in different organizations that had different methods of tapping the knowledge of workers, and allowing them to express their views and to react to their views.

25 So it was a very, very...it's a very complex field when you are talking about hundreds of thousands...well, tens of thousands, hundred thousand firms across the province, in all

A. (cont'd.) types of industries.

5 Q. All with their different types of voluntary arrangements?

10 A. Yes, with different levels of sophistication, with different mixes of expertise. I guess it's fair to say that you could look at perhaps a metal stamping plant and compare it to a hospital, and look at the different blend of knowledge and organizational skills that exist within those two organizations and see how different they are, how complex one is and only by comparison how perhaps simple the other is in terms of the human relations that exist to do what that organization is set up to accomplish.

15 Q. All right.

Can we then go to this report, the Ham Commission report?

20 A. Do you...is it...let me ask you a question...is it worth describing for the Commissioners the way in which these statutes dealt with chemical substances, or has that already been discussed to your satisfaction?

25 Q. When you say 'these statutes', I take it you mean the pre-Bill 70 statues and what was in place with respect to chemical substances? I think it would be, perhaps, helpful if you could put it all in one place for us.

DR. UFFEN: Especially if you could bear in mind carcinogenic, potentially carcinogenic substances...or the ones that are related to lung ailments.

30 THE WITNESS: Before 1979, as I mentioned, there was the Industrial Safety Act, the Mining Act and the Construction Act. It's fair to say that neither of these acts had the word 'health' in their title, that perhaps indicative of the relationship. Nor was the topic of industrial health, or the effect of toxic substances on health and wellbeing given particular

THE WITNESS: (cont'd.) prominence in any of the substantive provisions of these statutes.

5 For example, you can look at the Industrial Safety Act, which provided for the enactment of regulations respecting any poisonous, dangerous or harmful material, substance or thing... which is section 45 (2), subsection 12...and the regulations in turn required the measures necessary to prevent exposure to any toxic substance by inhalation, ingestion or skin contact shall be taken. That's section 79 of Ontario Regulations 259 dash 72.

10 Furthermore, the same Regulation alluded in general terms to the need to isolate dangerous substances, and the provision of adequate ventilation and protective equipment, shower and eyewash fountains.

15 Only one regulation was enacted under the Safety Act, which proceeded Bill 70, which set out an exposure limit, and that was for noise, under the Industrial Safety Act, 1971, section 111 of Regulation 259/72.

Otherwise, the employers' obligation was cast in general terms.

20 DR. DUPRE: Could I just ask you in relation to that, these Acts, then, did not provide any statutory base for the guidelines that existed with respect to asbestos exposure?

THE WITNESS: I'm coming to that.

DR. DUPRE: Oh, fine. Thank you.

25 THE WITNESS: The Regulation under the Industrial Safety Act, to which I have referred, did provide that where a worker was exposed to a concentration of lead, mercury, beryllium, asbestos, isocyanates, silica, enzymes, flourides, benzol, or other substances of similar toxicity that is likely to endanger health, the director of the industrial safety branch could order the exposed workers to be examined at specific intervals, and if necessary and at his discretion removed from exposure.

30

5 THE WITNESS: (cont'd.) In applying these very general provisions, the staff of the ministry relied on medical and scientified advice from the staff of the occupational health protection branch of the Ministry of Health.

10 MR. LASKIN: Q. Not...I'm sorry, I didn't mean to interrupt you, but if you were going to leave that paragraph, I am still not certain...how did...what was the statutory basis for the promulgation of guidelines? You may have just said it, and I missed it if you did.

15 THE WITNESS: A. I guess the basis would be the necessity for the employer to take reasonable precautions to protect his workers, and in determining what reasonable precautions would be, and in looking at Regulation 79, where it is required that for toxic substances the employer must take particular precautions either by engineering controls, ventilation, work practices or protective equipment, in order to determine where a problem existed, where action was required, the ministry used its...the Ministry of Health provided the Ministry of Labour with its advice as to what reasonable precautions were, and these existed in the form of guidelines.

20 Q. So that if...dealing with asbestos particularly... when the Ministry of Health, in 1972, promulgated a threshold limit value guideline of two fibers per cubic centimeter, was that then sending a signal to the Ministry of Labour and to those employers working and using asbestos, that reasonable precautions for the safety of employees working with asbestos would require that exposures be not greater than two fibers per cubic centimeter?

25 A. I believe that's true.

30 Q. If indeed exposure limits were in excess of two fibers per cubic centimeter, even though that itself was simply a guideline, the ministry, if it so wished, could proceed

5 Q. (cont'd.) to enforce it, as it were, by acting on the general obligation of employers to take reasonable precautions for the safety of their employees?

A. Combined with the specific regulation, to take action, control exposure to toxic substances, under section 59 of the industrial establishment's regulation.

10 DR. DUPRE: And that is Regulation 79, to which you are referring there?

10 THE WITNESS: Regulation 79 of Regulation 259/72... Section 79 or Regulation 259/72.

DR. DUPRE: Okay.

Now, it is...

15 THE WITNESS: That's under the Industrial Safety Act.

15 DR. DUPRE: Right. It is that same regulation, 259, that provided that the director could order the surveillance of employees engaged in workplaces that used hazardous substances?

THE WITNESS: Correct.

20 Under the Construction Safety Act, which was Regulation 419/73, where a worker might be exposed to a concentration of lead, benzol or asbestos likely to endanger his health, a constructor was required to post a notice outlining the dangers involved and the precautions necessary for protection...section 4 (b) 4...Roman numeral four.

25 Part nine of the Mining Act contained equally general provisions. For instance, Section 212, subsection 1, stated:

30 "The ventilation in every mine shall be such that the air in all of its workings which are in use shall be free from dangerous amounts of noxious impurities, and shall contain sufficient oxygen to obviate danger to the health of anyone employed in the mine."

5 THE WITNESS: (cont'd.) For mining plants, section 214, subsection 4, provided similarly vague guidance about judging whether a worker's health was at risk. It stated, in part that:

10 "Ventilation must be provided where there was a gas, vapor, dust or other impurity that is likely to be inhaled or to an injurious extent by persons...likely to be inhaled to an injurious extent by persons in the plant."

15 The chief of the mines engineering branch did issue codes on technical matters, which his staff enforced under the general powers granted them by the Mining Act, section 610, subsection 1.

20 That sets the legal basis for the control of chemicals at the workplace, in Ontario, before the Occupational Health and Safety Act.

25 MR. LASKIN: Now, can we come back to the Ham Commission report, and can you tell us what that report contemplated in terms of the internal responsibility system, and is it easier to deal with it in its constituent elements, can we...what recommendations, if any, did it make to change the direct responsibility part of the system that was already in place by virtue of the statutory and regulatory framework you just outlined?

30 THE WITNESS: A. I think the starting point was simply to describe what the direct responsibility system was, and if you turn to the report itself, you can find a table in here somewhere...

Q. Could you hold on for just one second, Mr. Gladstone?

A. Sure.

MR. LASKIN: I just want to find out whether Dr.

MR. LASKIN: (cont'd.) Uffen had a copy of the report.

DR. UFFEN: I've got it down here, but it should be in...

MISS JOLLEY: Page 152.

DR. UFFEN: ...which one...

MR. LASKIN: Why don't we get another one?

There is a part of it in the compendium, but to the extent that Mr. Gladstone is going to refer to pages outside the compendium...

DR. DUPRE: What page?

THE WITNESS: It's following page 149.

MR. LASKIN: Q. The table?

THE WITNESS: A. Yes.

Q. Table fifty-one.

A. Fifty-one.

Q. Mmm-hmm.

A. And I think what this table does is to describe, in a sort of...the relationship between structure and function, how a company should deal with health and safety problems at work, and the relationships between the workmen, all the way up to the president and chief executive officer, for such activities as the nature of work, the responsibility for people, the responsibility of work performance, the direction of work, the relationships between people, the provision of facilities and equipment, responsibility for conditions of work and responsibility for accounting.

I believe that this is a complex way of describing the relationships and the functions of people at work, and this is what it takes to maintain an effective and safe operation.

What the Royal Commission did was to highlight the importance of this chain of responsibility, to indicate what wasn't working, in its opinion, and to make recommendations to

5 A. (cont'd.) improve the framework to enable this system to do its job properly.

I guess the three areas that come out have to do with the participation of workers within the organization, the provision of information to workers, and from workers to managers in an organization, and the right for workers to refuse work where it is necessary.

10 I said three, I should say four...and the need for better control over chemicals in the workplace, and the statutory base for that control.

15 Q. So that, just so that I understand that, when Dr. Ham looked at the system in the workplace and looked at table fifty-one, he identified four particular areas where, in his judgement, the system was not functioning properly?

20 A. I don't know whether Dr. Ham identified those particular areas or not. Those are some of the areas that I picked out, on reflection. If you want to carry it further, there are other things that, in his view, is recorded in this document, wrong with the way in which health and safety was organized in the province, and the statutory framework for that, but that's all recorded in here.

25 Q. Okay. The four that you have selected and just told us about - the participation of workers, the provision of information to workers, the right of workers to refuse work and the need for better control of the chemicals - why have you selected out those four?

Are those the four that emerge to you, on reflection, as being central?

A. Yes.

30 Q. Okay.

A. And I think these are themes that run through the book.

A. (cont'd.) There are others dealing with training, compensation.

5 Q. Okay. Are you now going to take us to what the report did to address those four matters?

A. With regard to the right of workers to participate in the system, as it were, the Commission, I believe, recommended that there be the two institutions, if you would like, established - joint health and safety committees and worker auditors.

10 It also...

Q. We better come back to those, but you carry on.

A. It also recommended the establishment of an advisory committee to the assistant deputy minister on occupational health and occupational safety, that he calls the health and safety authority, and that it be composed of workers and experts in the field, and representatives of management. And that would be another...call it a policy-level participation by workers in the system.

15 Q. Okay. All right.

A. In terms of information, I believe that the report documents the manner in which information is not provided to workers in the past. I believe that Ham used the term paternalistic attitudes towards workers in this regard, and took a very strong stand that workers should have access to reports, that they have a right to...I don't know whether...this is where information and participation blends, but to accompany an inspector on his tour of duty, that the report should be posted, that since they have a direct responsibility they should be part of the inspection system that checks upon the way in which the laws are met and the company achieves its goals of safe production.

20 And in terms of that, it's fair to say that the joint committees and the worker auditor would have a role

A. (cont'd.) to play in obtaining information and passing on information.

5 In the context of the mining industry, there were recommendations that dealt with training and provision of that kind of information to workers through a training program.

Q. Just...

A. That's information.

10 Q. Okay, that's information. Can we just stop there for a moment and focus perhaps a little more on the worker auditor on the one side and the joint health and safety committee on the other, and can you put a little flesh on those two matters, on the worker auditor, what his or her function would be, what relationship, if any, the worker auditor was to have
15 with the joint health and safety committees, and in turn what the Ham Report can see as the joint health and safety committee's will be doing?

A. I think it's fair to say that the idea of worker auditors and joint committees was put to us by the labour movement in extensive hearings and brief to the Commission,
20 and Ham, when he visited England and Sweden in the fall of 1975, was quite impressed by the manner in which the workers could contribute their knowledge through those types of institutions in those countries, recognizing that the social and economic and political climates were far different between the two
25 countries and Ontario in particular, but the whole idea was quite compelling and found itself translated into the idea of the worker auditor, which...

Q. Like the safety delegate...

A. In Sweden.

Q. And the safety representative...

30 A. The safety representative in England.

You recall that the Robbins Report was published

5 A. (cont'd.) in 1972, and it dealt extensively with a lot of the same issues, and I think had, again, some profound influence on the way in which we approached this subject.

10 The whole idea of a worker auditor is that you take a man who is interested in health and safety, that has some proclivity for it, and you give him training or give him the information he needs, and you make sure that he is given the time, on company time, wage time, to review the workplace in his area and to report his findings.

Q. To whom?

15 A. To management, on the problems he has encountered, what has to be done. And where there are health and safety committees, to link perhaps part of the worker representatives or safety delegates to the committee.

20 Q. There is discussion, either in Ham or in Burkett, of a phrase 'specific workplace anomalies', which I take to mean specific health or safety problems that occur on the job day to day. I suppose the question is, is the worker auditor, as an institution, envisaged to deal with what has been called workplace anomalies, specific?

25 A. Once again, this is a phrase that does not find its way into law, and it's something that I guess Ham and Burkett found quite appealing to describe when something is not performed according to standard work practices, in a company, and that's the broad way in which I believe they use the term anomaly.

Q. And...

30 A. And the whole idea is to enable workers to have the opportunity to go around, to see what's doing in the workplace, and in the area that they are, I guess, knowledgeable about in terms of the performance of the work, and that's what

A. (cont'd.) we are talking about when we talk about anomalies...and to identify those areas that are deficient.

Q. And report them?

A. And to report.

Q. And the worker auditor, I take it, would play a purely advisory role, is that accurate?

A. I believe so, yes.

Q. He would not have any decision-making power per se?

A. Well, if you combine that function with the concept of the right to refuse work, and if something is found that is just so obviously dangerous that the power is there, would be there in terms of Ham...now, Ham's report was translated into law in some aspects, and I guess the law...we can discuss that afterwards...I just note that the law went much farther than anything Ham envisioned with respect to the refusal to work.

So in terms of this document, if you combined the two functions, the workers would have the right to, as a result of the worker auditor. And this is all theory, mind you, but putting it together you can see that if the worker auditor found something wrong, the worker could stop work and say this is not correct, and I believe that my life is in danger, or whatever, and take corrective action.

Q. Did Ham contemplate that the worker auditor himself could stop work?

A. I would have to check the report. I'm not sure. I don't believe so.

If you put it in the contributive sense, he doesn't have that authority.

Q. Does he have a monitoring, auditing responsibility?

A. Yes. That's for sure.

A. (cont'd.) But what do you mean by monitoring?

Q. Well, perhaps you can tell us.

5 What kind of monitoring, what kind of auditing was it contemplated he would be doing?

A. I would imagine that it would be the tour of the workplace, checking conditions, checking records, talking with workers.

10 Q. If a government inspector came in and did sampling, was it contemplated that the worker/auditor would go around with the inspector?

A. If you put it in the terms of the worker/auditor accompanying the government inspector, yes. That would be fair.

15 Q. Was it contemplated that the worker/auditor performing his contributive responsibilities would do some of them completely independently, or would there be management or supervisor, at the same time, accompanying him?

In other words...

20 A. If I'm not mistaken, Ham thought that this was such an important function that the highest level of management available should go around with the guy. I think he said that in his report.

Q. So they should go around together, as it were?

A. Yes.

25 Q. Was it contemplated that the worker/auditor would be a member of the joint health and safety committee?

A. I believe that's true. Not all of them, that the institution of worker/auditor should, by some means, be linked to the institution of joint health and safety committees.

30 Q. But at the same time should stand apart from it in some respect?

A. Not necessarily.

Q. Not necessarily?

5 DR. DUPRE: I might just, counsel, read this recommendation which appears at page 157, that the membership of the committee...that is to say, the joint labour/management health and safety committee..."consist of equal number of persons appointed by management and approved by members of the collective bargaining units, if such exist, 10 and otherwise elected by the workers collectively, subject to the constraint that at least two of the persons selected be worker/auditors."

THE WITNESS: And that's how the link would be. You may have ten worker/auditors, but you would only have...that's how the institutions would be linked. 15

MR. LASKIN: Q. That's how they would be linked?

THE WITNESS: A. Yes.

DR. DUPRE: Can I also take it, when I reread page 154, that the worker/auditor is itself a part-time position in the sense, if I look at the paragraph that begins...it's the last paragraph on page 154... 20

"The Commission proposes that worker/auditors devote an appropriate part of one shift per month to the task of reviewing work conditions."

THE WITNESS: Yes.

DR. DUPRE: So it is very much of a part-time position? 25

THE WITNESS: Yes.

DR. DUPRE: And in this sense, that this is just not...I certainly don't want to confuse anything by leaping ahead, but just to make sure I understand something, that kind of worker/auditor is fundamentally different, in that sense, from the worker- 30 representative approach that the Burkett Report describes as in

DR. DUPRE: (cont'd.) place in the Canadian automobile industry?

THE WITNESS: Yes.

DR. UFFEN: So that I can stay on track...

THE WITNESS: But I think you can also say that what's in place in the auto industry is not linked to a particular workplace.

DR. DUPRE: The ratios, at least, we have been talking about - one auditor for twenty-five workers - you've got a one-to-six-hundred ratio in the auto industry.

THE WITNESS: Yes. It's different.

DR. UFFEN: The health and safety representative that's discussed in the Health and Safety Act, is that equivalent to the worker/auditor, or is equivalent to the autoworkers' representative, or something in between?

THE WITNESS: It depends on the particular workplace. It could be as close to what Ham was recommending, or as far away as the auto industry...simply speaking.

DR. UFFEN: It's flexible?

THE WITNESS: Well, simply because...and I'll have to refer to the Statute...

DR. DUPRE: Well, could I put this to you, you are going, if you pursued Mr. Laskin's line, to get to that Statute, and you will, I'm sure, pick up that clause then. Because I'm going to be in hot pursuit all over the place.

DR. UFFEN: Yes, I didn't want to jump ahead. I'm just trying to keep track.

THE WITNESS: The idea is the same.

DR. UFFEN: The idea is the same?

THE WITNESS: Yes.

DR. UFFEN: And it could be the same...okay. Come to it later on, then.

5 MR. LASKIN: Q. Just so that I understand, and I
may be lagging behind everybody else here, but just so that I
understand the relationship between direct responsibility, the role
of the worker/auditor and the role of the joint committee under
Ham, can we perhaps take a specific example and let's take Dr.
Uffen's example. I just want to find out how that problem gets
resolved under Ham, or doesn't get resolved, and at what stage
the worker/auditor gets into the picture, and at what stage, if
10 at all, the joint committee gets into the picture.

So let's...there's the problem, there's a new piece
of equipment and the dust is backing up.

Now, can you trace the system through for us and
tell us how that problem might get resolved under Ham?

15 I guess the first stage, as you said it before was,
I suppose a worker, ideally, is supposed to tell the supervisor
the dust is backing up and something is wrong, this machine isn't
working?

THE WITNESS: A. That's true.

Q. Okay.

20 A. And I would have to ask Dr. Uffen how many
workers are involved in the plant. You can't...

DR. UFFEN: I see.

25 THE WITNESS: You can't divorce...we are talking
about a fairy tale and I don't know if it's a plant that's got
six hundred people, or twenty people. Ham was talking about an
industry that had large, complex organizations that are spread
for miles underground, that might be able to blend the two
systems together, so that if this is a large organization that we
are talking about...

30 DR. UFFEN: Well, if it will help, I will just
set the...five hundred employees, but twenty-five in this
particular department. Of the twenty-five, five of them probably

5 DR. UFFEN: (cont'd.) are going to be exposed along with the worker, the guy who discovers the machine is not operating right.

Does that help?

THE WITNESS: Yes, sir.

10 MR. LASKIN: Q. And one worker/auditor...let's take his ratio...we've got one worker/auditor in this little section.

15 THE WITNESS: A. And I would guess that the worker should report up to his supervisor, and if the supervisor says there isn't a problem and the worker isn't satisfied with that answer, he could consult with the auditor in the area if he happens...and this is one of the bigger problems...is the auditor on the same shift as the worker when the problem comes up.

Assuming that they are working on the same shift, they could take the matter up with the supervisor again, or take it up to a higher level if necessary.

20 Q. The worker/auditor, I take it, could find out about the problem himself through his monitoring and inspection role?

A. Yes.

Q. Or he could directly...or he could find out about it indirectly because a worker reported the matter to him, having not been able to resolve it directly with his own supervisor?

25 A. Yes.

Q. In either of those cases, then the worker/auditor's role would be to report the matter to the supervisor himself and try to work out a resolution with the supervisor?

A. I would assume so.

30 Q. And at that stage, I take it, the joint committee would not have any involvement? This matter would not, at this stage, be brought to the joint committee?

A. I wouldn't think so. If it could be resolved satisfactorily.

5 Q. The focus and the attempt would be to resolve it amongst the players...hopefully between the direct responsibility system, but if not that, at least with the assistance of the worker/auditor, leaving the joint committee aside?

A. I would assume so.

10 Q. Would I take it then, following from that, it would only be if those players were not able to resolve the matter satisfactorily that the worker/auditor would then report the matter to the joint committee?

15 A. I'm not sure that that's true. If it is a problem, if it's not being fixed, if the worker's health is in danger, they have other avenues to take to protect themselves and the workers involved.

20 I think that one of the difficulties with this report is the linkage, and how it would work, and I think that if you liken the health and safety committee more to a policy committee, then these day-to-day problems, if they are not resolved or they recur, would indicate a need for a different approach within the company to dealing with those types of anomalies and the committee itself could deal with the larger issues that are raised by the specific occurrences that take place on the shop floor.

25 In that way, the representatives on the committee could use their experience in day-to-day activities to help set the agenda for the committees.

30 Q. Would a larger issue, say arising out of that example, be - should we have brought in this new equipment, should we reconsider going back to the old equipment or some different type of equipment on an ongoing basis? Would that be a kind of more general policy-type issue?

5 A. If that's the way in which the workers perceive the problem, I would assume that that would be something that they would try and bring up and discuss.

Q. But, just so I'm clear, Ham did not contemplate these specific day-to-day problems would be brought to the joint committee for resolution?

10 A. I'm not sure that that's true. That's where it becomes very difficult in understanding the linkage, as in Ham, between the work of the worker/auditor and the role of the joint health and safety committee.

MR. LASKIN: I'm sorry, Dr. Uffen.

15 DR. UFFEN: No, I was just thinking of an example that might test your argument.

You have a safety barrier, you are not supposed to go through this thing because when the barrier is down there is a hazard on the other side. Somebody goes through it. That's a day-to-day problem that would be dealt with in one way.

20 On the other hand, the barrier system isn't working right - somebody presses the button to close it and the damn thing closes sometimes, doesn't close other times, and this goes on and on for weeks, or could do.

That would come up in front of a committee?

THE WITNESS: That's fair.

DR. UFFEN: A fair enough example?

25 THE WITNESS: Yes.

DR. UFFEN: That happens in mines and all over the place.

30 MR. LASKIN: Q. Can I ask you, Mr. Gladstone, without going through specificall in the report, did Ham, nonetheless, contemplate in a general way, or even specifically, the kinds of things that the joint health and safety committee would do? If he didn't specifically address the linkage between

5 Q. (cont'd.) worker/auditors and joint committees, did he nonetheless focus in on kinds of contributive responsibilities joint committees would have?

A. Well, first of all, I think that the committee, as Ham says, would have a responsibility to tour the operation from time to time, to see how things were going.

10 That would, in a sense, almost duplicate what the worker/auditor was doing on a periodic basis. So you would have two institutions within a company that would be going over the same workplace, to do the same type of thing, for the same purpose...that's to find anomalies and take corrective action.

15 I think that Ham did say that the tours would be linked to more policy-related issues such as environmental standards, standard work procedures, modification or extension of plant education and training for health and safety, the design and use of protective equipment, the maintenance of tools, equipment and processes, the efficient use of ventilation, the hazards related to haulage and hoisting, the use of hazardous chemicals, housekeeping and underground fire procedures, were just some
20 of the general issues that they would try and relate specific conditions that they found to.

25 I believe that Ham did spend some time looking at existing minutes of health and safety committees that were set up either by contract, or certainly on a voluntary basis, and found that they did deal with a lot of the mundane, as opposed to, I guess what he would call policy-related matters.

He hoped that the committees would deal with problems like identification of hazards, systems in place to control them, investigations and how well they are doing.

30 I think he had a...he believed that there was a higher level of functions for these committees than was currently exhibited by his review of the...by the minutes.

Q. Can we leave this report, then, and come to Bill 70?

A. I believe that we were...

Q. I'm sorry. We haven't...yes.

A. We addressed, initially, two other...

Q. You are quite right, Mr. Gladstone, and you haven't told us how Dr. Ham addressed the right of workers to refuse work, in his report, and then the other item where he identified the need for better control over chemicals.

Do you want to tell us about those two, and then we'll go to Bill 70?

A. In terms of refusals, the right to refuse work, this was a subject that was brought to the Commission's attention by the labour movement, and I think Ham sort of took it halfway.

He recognized that there was a problem, that simply the simple duty not to perform unsafe work - which, for example, existed in the Industrial Safety Act - was not enough, and said that the problem had to be dealt with within the organization, and set up a procedure in his mind that would end at the, I guess, upper management level within a company.

I don't believe he envisioned the inspector coming in and making a decision and...

Q. He didn't envisage the ministry or the government...

A. The government.

Q. ...the third party in all of this, playing any role?

A. I don't believe so. I think that the whole process ended within the company.

DR. UFFEN: It's left...on page 78, at the top of the page, there's a description of it and it makes no mention of that government role.

5 DR. UFFEN: (cont'd.) "There would be a statutory requirement that the work situation be examined and judged by a member of senior supervision, in the presence of the worker/auditor acting as an observer, and that a report of the circumstances be made to the Mines Inspectorate, by the manager." Now, the Mines Inspectorate...have you found it?

10 MR. LASKIN: I'm sorry, Dr. Uffen. What page are you on?

DR. UFFEN: Page 178. (sic)

MR. LASKIN: Yes.

15 DR. UFFEN: Now, the Mines Inspectorate, he must have had it in his mind a bit, then, that a report of the circumstances be made to the Mines Inspectorate, by the manager.

THE WITNESS: Correct.

MR. LASKIN: Okay.

20 THE WITNESS: And the issue of the control of toxic substances is really, I would venture to guess, sixty percent of the report, and the problems that were identified with regard to the identification, evaluation and control of chemicals, and what was needed in terms of statutory basis to do that, and the need for the development of particular regulations on a careful basis to, I guess, protect workers from exposure to the chemicals.

25 The other...one other interesting idea that he introduced with regard to metallurgical plants, is what he called the metallurgical audit, so that you can trace through any losses that can occur in a production process, and have some idea of the balance of chemicals within the system.

MR. LASKIN: Q. Okay...

30 DR. UFFEN: Were you about to leave this?

MR. LASKIN: I was, Dr. Uffen.

DR. UFFEN: Could I have a quick question before
you do?

MR. LASKIN: Yes.

DR. UFFEN: You know the table fifty-one that we
referred to earlier on, which identified functions and
responsibilities, in the mining industry it is not infrequent
that you can have a wholly-owned company, but you can also have
a wholly-owned subsidiary.

Was this chart drawn up with only the single-
operating company in mind, or did they consider the possibility
of a wholly-owned subsidiary?

THE WITNESS: I don't know.

DR. UFFEN: I ask this because...

THE WITNESS: I would assume that it's just a
single company.

DR. UFFEN: Yes. But you don't know of any
attempt, then, that was made to take into account the possibility
of a wholly-owned subsidiary where the functions of president
and chief executive officer may be quite a little bit different
from the ones that are in this chart?

THE WITNESS: The only comment I would make is
that the chief executive officer would still be responsible for
the performance.

DR. UFFEN: That's what this chart proposes. It
proposes that the president and chief executive officer would
authorize capital expenditures, determine the policies to make
the purposes of the enterprise compatible with the legislated
requirements and social trends.

Now, that fits very nicely for a single
corporation with its own owners, its own shareholders, its own
board of directors...

THE WITNESS: Correct.

5 DR. UFFEN: ...but when you get into a wholly-owned subsidiary of another organization, I think we've already learned that the chief executive officer may play a different role.

THE WITNESS: That's true.

10 DR. DUPRE: I wanted to ask you, Mr. Gladstone, you said the only comment I would offer is that the president and chief executive officer would still be responsible.

That the president and chief executive officer would still be responsible under what? Under the internal responsibility system as outlined in principle, or under an existing statute?

15 THE WITNESS: I believe I used the word chief executive officer. I did not use the word president.

DR. DUPRE: Okay.

20 THE WITNESS: And as the person responsible, if the president and chief executive officer of a given entity in Ontario is a paper tiger and is responsible really to someone else outside the country, or outside the province, to another person within the province...

DR. UFFEN: Or even within the province.

25 THE WITNESS: ...I would see that...and this is a personal opinion...that there is a relationship there that would take it up the chain. That president reports to someone higher, who may set policy. If that's the case, then he is the man who would be ultimately accountable, in my personal opinion.

DR. DUPRE: And this is a personal opinion about who would be ultimately accountable in the internal responsibility system as it exists in theory, or as it is laid down by statute?

30 Or maybe I could just give you notice of that question because we can get to it when we look at the statute.

THE WITNESS: Well, your question really is, who is the employer. I can't give you that answer right now.

DR. DUPRE: I'm not sure that that's my question, but that's certainly one way of taking a slice of my question.

THE WITNESS: Yes, okay. We'll talk about it later.

DR. DUPRE: Okay.

MR. LASKIN: Q. Well, the opinion that you gave, at least in terms of Ham, is that what you understood Ham recommended, leaving aside whatever the statute says or doesn't say?

THE WITNESS: A. Ham, I don't believe, makes any reference in his report to wholly-owned subsidiaries. I am only speculating.

DR. UFFEN: Would I be safe in drawing a conclusion that if someone like me, or anyone else, was interested in that particular case of a wholly-owned subsidiary, we could sit down and re-examine this chart and then draw up our own chart?

THE WITNESS: Yes.

DR. UFFEN: All right. Thanks.

MR. LASKIN: Q. Can we turn now to the statute, to Bill 70, and can you by way of overview tell us to what extent the government accepted Ham, and to what extent it in fact implemented what Ham had recommended, in Bill 70?

THE WITNESS: A. That's a very difficult question to answer. The legislature passed the Occupational Health and Safety Act in 1978, and I think that the principles that I addressed in terms of the right to refuse work, access to information, the right to participate, the whole idea of duties and responsibilities where the parties' provisions for the control of toxic substances have all been incorporated in the body of the statute, and also in the section that empowers the Lieutenant-Governor in Council to make regulations, I would say that one area that the Commission

5 THE WITNESS: (cont'd.) did not touch upon was the whole process of notification of new substances, and that provision is in the statute, and I don't believe there is any reference, in terms of recommendations, to that in Ham's report.

I believe some people criticized the report for that lacuna.

Q. The report?

10 A. The report, yes. The Act certainly does have that provision.

15 So in principle, I would think that the Statute embodies many of the ideas that were enunciated by Ham, and I guess they differ in some detail simply because you can't take a report and translate it into statute directly, especially since it has to go through a quite-complex process in the legislature before it becomes law.

Q. Let's take some specific parts of the internal responsibility system as contemplated by Ham, and let's start with the worker/auditor.

20 Can you tell us...and I suppose, let's deal with it on the construction side and on the fixed-site workplace...to what extent was the worker/auditor concept incorporated in the Occupational Health and Safety Act, first of all on the construction side?

Would you like a copy of the Statute?

25 A. It's here somewhere, sorry. Tab two.

Q. Tab two.

A. I'm just looking for my copy of tab two. Sorry.

Q. Why don't I give you this little...

A. In general terms...

Q. Do you want the little green book?

30 A. I'm okay.

I believe the section that deals with representatives

A. (cont'd.) is section seven, and section seven states that:

"Where the number of workers at a project regularly exceeds twenty, the constructor shall cause the workers to select at least one health and safety representative from among the workers on the project, who do not exercise managerial functions."

Q. And subsection seven and subsection six set out the powers? I suppose subsection nine?

A. Yes.

Q. Six, seven and nine?

A. And subsection two states that:

"Where there are less than twenty workers regularly employed, the minister may order a health and safety representative to be appointed."

Q. So this is on the construction side?

A. This is on the industrial side.

Q. Sorry.

A. Subsection...you were talking about the representatives, right?

Q. Yes.

A. On construction where there are twenty or more workers regularly employed, you have to have a representative.

Q. And is the health and safety representative that is referred to in section seven, as you understand it, generally equivalent to the worker/auditor?

A. The notion is the same.

Q. The institution is?

A. Yes, the notion is the same.

And in other areas.

Q. I'm sorry?

A. In other areas where there are other types of

5 A. (cont'd.) industry, nonconstruction, and even where there is construction and there are less than twenty people, the minister has been given the option to issue orders to appoint a representative at a workplace.

I will read subsection two of section seven:

10 "Where no committee has been established under section eight, which deals with health and safety committees, or where the number of workers at a project does not regularly exceed twenty, the minister may, by order in writing, require a constructor or an employer to cause the selection of one or more health and safety representatives for a workplace or parts thereof, from among the workers employed at the workplace, or in the part or parts thereof, who do not exercise managerial function and may provide in the order for the qualifications of such representative or representatives."

15 Q. Without meaning to skip ahead, do you know whether the minister has ever exercised the power that is vested under that subsection?

A. I don't know.

20 Q. Okay. Now, on the fixed-site workplace side of things, do we find the worker/auditor institution?

25 A. Only where the minister orders, may order it appointed, where there are less than...where there is no committee required.

DR. DUPRE: We are talking about fixed sites?

THE WITNESS: Mmm-hmm.

30 DR. DUPRE: Now, let me ask you about subsection eight of section eight:

"The members of a committee who represent workers"...

5 DR. DUPRE: (cont'd.) that refers to a joint
committee..."The members of the committee who represent workers
shall designate one of the members representing
workers to inspect the physical condition of
the workplace not more often than once a month
or at such intervals as the director may direct,
and it is the duty of the employer and the workers
to afford that member such information and
10 assistance as may be required for the purpose of
carrying out the inspection."

THE WITNESS: Mmm-hmm.

15 DR. DUPRE: Now, when I read that away back, I
immediately scribbled in the margin, is this Ham's worker/auditor.

I scribbled it in the margin because, frankly, it
appeared reasonable to me to conclude that if I was looking for
Dr. Ham's worker/auditors, I had indeed found them in eight/eight.

Of course, I will admit I was looking for Dr. Ham's
worker/auditors in this legislation.

20 THE WITNESS: His worker/auditor is the health
and safety representative in section seven. The functions that
a...

DR. DUPRE: The worker/auditor is the health and
safety representative in section seven?

THE WITNESS: That's what I said.

25 DR. DUPRE: Section seven looks very much as if
it applies to construction, or nonfixed-site...

MR. LASKIN: It's the construction side.

THE WITNESS: And that's where they have limited
it to.

DR. DUPRE: I see.

30 THE WITNESS: Except where the minister may order
it in places where there isn't a committee, and on construction sites.

DR. DUPRE: I see. And therefore, I obviously
was reading eight/eight in perhaps an erroneous fashion?

THE WITNESS: No, I would...

MR. LASKIN: Q. Is it fair to say there is some
of the worker/auditor concept embodied in section eight, subsection
eight?

THE WITNESS: A. I believe that that's true.
I think if you recall, Ham did say that the health and safety
committee had to tour the workplace, members had to tour the
workplace, and in this fashion I think that rather than having
the institution of the worker/auditor, they have given the worker
members on the committee the right to inspect a workplace not
more than once a month.

DR. DUPRE: Okay.

Now, Mr. Gladstone, I need your help, because rightly
or wrongly, when I first read eight/eight a long time ago I put in
themargin 'is this the worker/auditor', and I'm still puzzling
over it and needless to say, my puzzlement, if I may use that
term, was only enhanced by the research study by Gunderson and
Swinton, which at page eight decimal five gave me a training
course on apparently how section eight/eight has been interpreted.

Have you got Gunderson/Swinton with you, Mr.
Gladstone?

THE WITNESS: No, I do not.

DR. DUPRE: Okay.

MR. LASKIN: Well, I have a summary of it.

DR. DUPRE: Well, I'm noticing, counsel, that
it's five minutes to eleven. I wonder if this might be an
appropriate point at which to take a break, and I will, in particular,
if Mr. Gladstone would indulge me during the break, like to
refer his attention to pages eight-five and eight-six in
Gunderson-Swinton, and my opening question, Mr. Gladstone, is

DR. DUPRE: (cont'd.) simply going to be this - is what they describe here accurate, to the best of your knowledge?

THE WITNESS: Or if there are other sources of information.

DR. DUPRE: We can go on from there.

THE WITNESS: Fine.

MR. LASKIN: Fifteen minutes, fifteen or twenty?

DR. DUPRE: Fifteen minutes, yes.

THE INQUIRY RECESSED

- - - - -

THE INQUIRY RESUMED

DR. DUPRE: May we proceed, and to fulfill the notice which I gave you, I will just start by asking whether what you have been able to read on pages eight-five and eight-six of the Gunderson-Swinton study reflects your...well, is it accurate from the standpoint of your own knowledge base?

THE WITNESS: The Statute does say that a worker representative will inspect the workplace not more often than once a month, or at an interval established by a director, and that's the director of the Ministry of Labour's occupational health and safety division.

That's what the Statute says, and my understanding is that if agreement can be reached between the parties that an inspection interval will be monthly, that is afforded by law.

If the parties want to inspect every two weeks or every week because of the size of the workplace, that a director...they can make application to the director for that to occur, and indeed that has happened and the director has ordered inspections more frequently than once a month.

If the way in which the Statute is worded, the parties cannot agree to an inspection cycle of once a month,

5 THE WITNESS: (cont'd.) if one wants monthly or the other says it's not worth monthly, it's worth every two months, and they can't agree...they may agree, and that's permitted by the Statute for them to reach that kind of agreement. If they disagree, they have the authority to, they have the right to take the matter up with the director, who can order not only monthly, but more frequently than monthly inspection intervals.

10 So that's my understanding of that particular section.

15 DR. DUPRE: Now may I, Mr. Gladstone, draw your attention to the second sentence...sorry, the third sentence, in the paragraph on eight-five, that begins with the words "one worker representative", and the third sentence begins with the words "the legal branch". Do you see that?

THE WITNESS: Yes.

DR. DUPRE: Okay.

20 "The legal branch of the Ministry of Labour, in response to a question from a company which has refused to permit a monthly inspection of the whole plant, interpreted section eight-eight to mean that monthly inspections of the whole workplace are not mandatory unless the director so orders".

25 Then the citation is Interpretations, Occupational Health and Safety Act.

Does there exist in a document called Interpretations, OHSA, 1978, such an interpretation from the legal branch of the Ministry of Labour?

30 THE WITNESS: There may. I would have to check our records to see in what form that exists. I am not doubting that the citation is incorrect (sic). I am not sure, though, that there may not have been some impression of the ideas inherent in

5 THE WITNESS: (cont'd.) the interpretation that would give the impression that you can't inspect more frequently than once a month, that there aren't other ways of dealing with the matter.

DR. DUPRE: Just before I go on here, I would just like to ask a question of my learned counsel over here.

10 Learned Counsel, to me as a layman if such an interpretation in fact could be made by someone...I'm not saying it's necessarily the main fact because we can always check that out...but what I'm asking is, if such an interpretation could be made of eight-eight, I suppose it would be because the interpretation would mean...the interpretation given the words 'not more often than once a month or at such intervals as the director may direct', those words would have been read as if
15 they meant 'not more often than once a month as the director may direct, or at such intervals as the director may direct'.

That's the only way that I could imagine one could make that kind of interpretation.

20 I guess my question to you, counsel, is, am I cockeyed in saying what I have just said?

MR. LASKIN: I have two comments, Mr. Chairman. Number one, I think you are right. And number two, speaking only for myself, if that's the legal interpretation placed on it by legal branch, or if that's what I see as being read here...

DR. DUPRE: Or by someone, but...

25 MR. LASKIN: ...I think I would have to say to you, I respectfully disagree with that interpretation.

DR. UFFEN: Mr. Chairman, I find that we needn't prolong this, that as I read it, it says 'not more often'. It doesn't say 'at least', or 'there shall be an inspection once a month'. It says 'not more often than'.

30 So the question of whether it's compulsory once a

DR. UFFEN: (cont'd.) month is buried in the interpretation.

5 I think the interpretation is sound.

MR. LASKIN: But the issue...perhaps this isn't the place to get into a legal discussion, but it seemed to me that the underlying central issue is whether the worker has a right, whether there is a mandatory duty or not, and whether the worker has a right to inspect the workplace at least once a month, by virtue of this section without any ruling of the director and without any agreement between the employer and the employees. It seems to me that's the critical question.

DR. UFFEN: That's the question.

MR. LASKIN: What I read a researcher telling us is, the section doesn't say that.

DR. UFFEN: It doesn't say that. It says 'not more often than once a month'.

MISS JOLLEY: There was...

DR. DUPRE: Please, Miss Jolley.

MISS JOLLEY: There was a discussion, and I'm not sure if this refers to the particular plant, I think it was the UAW plant, and the issue was over workplace as opposed to once per month, and the definition of workplace and what they could in fact judge as the workplace to be inspected, as opposed to the time.

But I'm not sure if that's what that particular one is referring to.

MR. LASKIN: I don't know whether the witness can answer the question as to what was the intent of the legislature in enacting this section....was the intent of the legislature to allow a worker to inspect once a month, if the worker so desired, without having to resort to the director or without having to resort to an agreement with management?

5 THE WITNESS: A. I don't know. All I know is what's in the law now, and that is clearly stated 'not more than once a month'. It does not say 'at least once a month', and you just have to take it from there.

DR. DUPRE: Can I just ask my Learned Counsel one more question?

10 I would be reading this clause correctly if I at least concluded that very clearly this clause places a legal obligation on the members of a committee to designate one of the members representing workers, to inspect?

MR. LASKIN: No question about that.

DR. DUPRE: That they have a clear-cut legal obligation to.

15 So at this point the question would really be, does a Statute which has clearly imposed a legal obligation on the workers to select someone to inspect then go on to basically say that okay, they've got the legal obligation to designate somebody to inspect, but whether that worker ever gets around to inspecting, whether it's not more than once a month or more frequently is up to the director to decide?

MR. LASKIN: Yes.

20 DR. DUPRE: Mr. Gladstone, I have just done this to put my concern on the table. In fact, I don't know what we are going to do with it, but quite evidently to the extent that we are here to recommend about legislation and policy, we have to have some...we'll have to get around to having some clear understanding of how the existing words are actually interpreted, and of course if it happened that that was fine with us, we wouldn't recommend any change in wording. But on the otherhand, if it isn't, that's the way we felt.

30 So perhaps all I need at this point is to ask that we be, the Commission be given the interpretations document

DR. DUPRE: (cont'd.) which is referred to here,
at some time if this would be possible.

5 THE WITNESS: I will check with the ministry.
I don't foresee any difficulty. But if I can just make one
comment for the record, you left the impression, I think, that
workers may not inspect the workplace ever, and I don't think
that the Act envisions this happening. It does say that he shall
inspect the workplace.

10 MR. STARKMAN: Mr. Chairman, I am somewhat unhappy
with that last answer from the witness when asked for the
interpretations document, and the answer was 'I will check with
the ministry and advise', as I understood it.

15 I think we need to clearly know now whether or not
this person is going to produce that document or is not going to
produce the document. I don't understand 'I will check with the
ministry and advise'. It's a little unclear, and I'm not sure if
that is the type of answer which is satisfactory to the
Commission.

20 MR. LEDERER: With all due respect to Mr. Starkman,
what the witness has indicated is he doesn't know what is being
referred to there, and there may or not be some privilege to which
that document is subject. As you will recognize, Mr. Chairman,
under the Public Inquiries Act, privileges still hold, and I
understand the witness's answer to be the appropriate one - I
want to check to see what there is and if there is some problem,
25 we'll look into it.

30 He also said, I don't think there will be any
difficulty, and I would be hopeful, as he apparently is, that
he will be able to find that document and to provide it to you,
but it would be inappropriate for us to undertake to provide
something when we don't even know what it is.

5 DR. DUPRE: I certainly agree with that, counsel.
I never like to anticipate any trouble in getting anything until
I finally hit the point where I don't have it.

10 MR. LASKIN: Just while we are on that section,
because I intended to ask you a couple of questions about it, do
you know whether it was the intent of the legislation or whether
there is an interpretation bulletin or provision which addresses
itself to the question of whether the right to inspect, in section
eight, subsection eight, carries with it the right to do air
sampling, for example, or to take measurements?

THE WITNESS: A. I don't know.

Q. Could you...

A. I could find out.

15 Q. ...when you are looking at the question of
interpretation extend your inquiry to find out whether that
issue has been addressed?

A. Yes, I will.

20 DR. UFFEN: Could I ask a question for legal
guidance on this? When we ask a witness to find out about intent
of legislation, it seems to me two things are involved - one is
the drafting of the material and the actions of the legislature.

I think he may be able to cope with the drafting of
the material, but I don't know how we can ask him about the intent
of the legislature.

25 MR. LEDERER: I wonder, Mr. Chairman, if I might
address that question, if it's not inappropriate?

DR. UFFEN: I need a little instruction.

30 MR. LEDERER: Well, I think the point is very
well taken. It's perfectly obvious that no public servant, Mr.
Gladstone or any other, can indicate to this Commission what the
intent of the legislature was. However, the reason I didn't
object at the time is that when Mr. Laskin asked his question, he

MR. LEDERER: (cont'd.) was careful enough to say, 'I don't know if you can do this, Mr. Gladstone,' and Mr. Gladstone's response, I think, was, 'I really can't do it', and I think that is the fair response.

It puts the public servant in an impossible position to attempt to somehow summarize the intent of...I'm not sure how many members we presently have, a hundred and some-odd disparate opinions that would go in to form the intent of the legislature.

I think what Mr. Gladstone can do, and it has been the major thrust of Mr. Laskin's questions, is to indicate from his experience with the Ham Commission what that report says and his understanding of that report, and to attempt to compare his own understanding of that report with his own understanding of the legislation.

But I'm not sure, in fairness, he can go any further than that.

MR. LASKIN: Clearly, I accept all of that and you are both quite right..and I didn't mean to put Mr. Gladstone in any difficulty in that regard, but there are on occasion certain documents in existence that we may not know about which give some idea as to what the purpose behind this legislation was, and sometimes between purpose and drafting something gets left out.

It may be in this case Mr. Gladstone can't help us. It may be that there is some document in existence that indicates these are the points the legislation wanted to cover.

MR. LEDERER: Such a document...and I don't know whether one exists in this case, of course...doesn't demonstrate the intent of the legislature. What it demonstrates is the intent perceived by the person who prepared the document as to what he thought, or whomever he consulted with thought, that the direction to which that legislation was to go.

5 MR. LEDERER: (cont'd.) But again, I'm not sure that it would speak to the intent of the legislature, and shouldn't be interpreted in that way.

THE WITNESS: If I can clarify...

MR. LASKIN: Legislation was my question, not legislature.

10 THE WITNESS: Pardon? I'll just clarify my understanding as to what I shall do. I shall find out whether there are any interpretations that deal with section eight-eight and the worker's right to monitor the workplace.

15 MR. LASKIN: I think, quite frankly, certainly from where I sit, if there is a document called Interpretations, which covers the interpretations that have been issue, for the entire Statute, and subject to any argument or position you may take on privilege, from my point of view I think we would like to see all of those interpretations just because it would be helpful to us to find out the way in which the government responsible for enforcing the Statute is approaching it.

20 THE WITNESS: There is a document that has been made available to the Canadian Union of Public Employees and others, that summarized some of the interpretations that have been done, and I would be pleased to give the Commission a copy of that Interpretation.

25 DR. MUSTARD: Would that include all the interpretations of the Act?

THE WITNESS: No.

DR. MUSTARD: Counsel, I think we should request all interpretations that are recorded in the ministry.

MR. LASKIN: So requested.

THE WITNESS: Can I ask a question, then?

30 As you know...

MR. LASKIN: Go ahead.

THE WITNESS: Just hold yourself for a second.

As you know, we have given you one interpretation, so that indicates our goodwill of providing that kind of information to you.

That interpretation had the names of the people concerned excised, just to protect them, and I would ask if it would be acceptable to you if that information was presented without identifying the companies or the people involved, and if that were acceptable, I will once again undertake to check with my superiors, but I would see no reason why that couldn't be presented.

DR. DUPRE: I certainly would stipulate that that is acceptable, and just so we can get this thing out of the way and get on with it, for Mr. Lederer's comfort I would remind him that at the time when a particular...I'm going to call it small 'i' interpretation came up, and he raised the question that there might be a client-privilege situation involved here.

At this point my reaction was to leave the ball very much in his court in order to...if he was able to produce it, fine. Otherwise, if there are questions of privilege, let's not hit those until they really present themselves to us.

But I do have one particular point of interest to me, which is the following: If there exists a ministry document that is called Interpretations, which is for example the sort of document that can be given to a researcher, as I would imagine would have been the case in this instance, you know, what I am interested in is what kinds of types ministry interpretations can be classified into, being sets of interpretations that are working documents that are shared on a general basis, and then other kinds that might or might not involve privilege and, of course, they are in a different category.

MR. LEDERER: Sorry. Are you asking if there are such categories?

DR. DUPRE: Yes, I'm asking. But I don't necessarily want an answer now.

MR. LEDERER: Oh, I see.

DR. DUPRE : Just let me know in due course...or do you know?

THE WITNESS: To my knowledge, the ministry has prepared two documents. One was an interpretation bulletin dealing with the payment of health and safety committee members during the course of their work, and it was widely disseminated to management and labour so that people would understand what our position would be when the issue of money arose.

There was also a request by...I believe there was a request from the Canadian Union of Public Employees for information to assist them in understanding our position vis a vis specific areas that are covered by their membership, and such a document was prepared for them and circulated to the unions and, I believe, to management.

This document is available to you.

There are, as you can well imagine, a wide variety of questions that both employers and unions and workers and concerned citizens raised with the ministry. There are questions raised by our own staff about the meaning of particular sections, and our legal services branch provides advice, and these are not in a particular document that has been printed or published at any particular time.

They fall within the private correspondence between the person who writes and the person who applies, and in many cases they fall within specific relationships of a client/solicitor relationship.

That's my understanding of the information that we have.

DR. DUPRE: Now, Mr. Gladstone, I'm going to hand

5 DR. DUPRE: (cont'd.) you back to my counsel in a minute, but my asking you to read eight-five and eight-six again I've raised the question of how eight may or may not have turned out to have been interpreted.

10 Let me just go back to my interpretation of eight-eight as I originally read it, and my interpretation of eight-eight, I must tell you...and I'm telling you this so that you can, please, feel as free as you can to challenge it...my interpretation of eight-eight is that this is indeed the Ham worker/auditor, not least when I refer back to page 154 of the Ham report, and note indeed that the Commission Proposes that worker/auditors devote an appropriate part of one shift per month to the task of reviewing work conditions, and the paragraph goes on to deal with that.

15 That is how, in reading eight-eight, I said to myself 'there's the Ham worker/auditor'.

You know the Ham report much better than I do, because you were so involved in it.

Am I crazy to have made that linkage?

20 THE WITNESS: The function is the same. The activity is the same. But if you want to relate it to the institution of worker/auditor, it's not the same.

DR. DUPRE: Would you explain that for me?

25 THE WITNESS: Well, the worker/auditor was supposed to be...there was supposed to be a whole range of them depending upon the number of workers in the workplace and...

MR. LASKIN: Could we in...it may be of some assistance in looking at that question to turn to Burkett, which is...because it addresses this very point...at tab six. At page sixty-four, which is the third page of text.

30 THE WITNESS: I'm not sure that that helps or furthers the discussion.

MR. LASKIN: Okay.

DR. DUPRE: I agree entirely.

5 THE WITNESS: If you want to deal with this matter, we can discuss it separate from the main question.

MR. LASKIN: Okay.

10 DR. DUPRE: The reason why I agreed with the witness, counsel, is that those sentences are underlined in my text, and I heard the sounds of gravedigging even louder in terms of my own capacity to understand anything when I read them, so maybe we should just defer that until we get around to it when the time comes.

MR. LASKIN: I'm sorry. I didn't mean to interrupt your question.

DR. DUPRE: Okay. No, fine.

15 No, I was trying to extract from the witness, in terms of his involvement with Ham, how he saw the difference, and I think I was beginning to get there. In terms of activity and function, you say, there is indeed a similarity?

THE WITNESS: Right.

DR. DUPRE: The difference lies in?

20 THE WITNESS: I see it in terms of the scope, or in terms of the numbers involved. The worker/auditor was limited to a narrow area in a particular workplace. The health and safety representative workers have a much broader area to cover. And they may devote more than part of one day a month to that activity, in some workplaces.

25 DR. DUPRE: Indeed, just to try and pinpoint if I understand the difference, the way I look at Ham, you've got one worker/auditor for every twenty-five workers, correct?

30 When I look at section eight, of course, they designate one member to inspect the workplace, and the workplace could be a workplace in which hundreds are involved, or twenty-five and so on.

5 DR. DUPRE: (cont'd.) By saying this to you am I understanding what you tried to convey to me as the principal difference?

10 THE WITNESS: I think that's fair. I would also say that if it's a larger workplace, the likelihood...and there is no guarantee of this, of course...the likelihood is that there would be a chain of committees that would narrow down the areas that they would be responsible for, so there would be more workers involved in narrower areas, and if you want to...if there is some need to try and trace the worker/auditor into any legal entity, I guess that function is carried through by these people, but...and I think it's important to emphasize the function rather than the idea of the worker/auditor.....narrowly conceived, you have to look to section seven where you have health and safety representatives, on the construction side.

15 In that sense, I'm not sure that the relationship between numbers of workers and representatives would hold. You just can't take Ham and say that his ideas are here and the law is there and where do they stand.

20 My opinion is, you have to take a broader view of the activities, the goals that are described in the Commission report, and see if they are being carried through in different ways in the Statute.

25 DR. DUPRE: I take it that the Act does not mandate joint committees in nonfixed-place industry? They have the worker/auditors, but no mandated joint committees, correct?

Save where the minister has directly ordered it?

THE WITNESS: That's one exception.

30 The only reason I am thinking about this has to do with subsection eight-two, and I think generally that impression is so, but I'm not sure that if you have a designated substance regulation or an order that didn't exempt construction sites

THE WITNESS: (cont'd.) from its application, that as a result you would not have to have a health and safety committee on that.

That's a question that I'm putting. I'm not saying it's so or not.

DR. DUPRE: That's very helpful, and I see your point, Mr. Gladstone.

MR. LASKIN: Q. Just coming back to comparing the health and safety representative on the construction side with the representative on the joint health and safety committee to do inspections under section eight, subsection eight, if you look at the statutory scheme of sections seven and eight, really the only difference in obligation is that on the construction side what is spelled out for the health and safety representative is the power to identify situations that may be a source of danger, etc., in the workplace, under subsection seven.

Then a specific right to take such time as is necessary to carry out his duties.

If you added those provisions to the role of the representative from the health and safety committee on the industrial side, aren't you really in a parallel situation? Really don't they have the same institution, the same animal, on both sides? Subject to your proviso on the number of worker/auditors in the workplace?

THE WITNESS: A. Yes.

Q. Am I correct in reading through this statutory scheme, and notwithstanding all of the obligations of an employer to provide information to a health and safety committee if the committee so requests it and so on, that there is no affirmative obligation on an employer to consult with the health and safety committee? Is that...am I fair or unfair about that?

That is one of the concerns that has been expressed

5 Q. (cont'd.) by one of our researchers, that you can't, when you go through the Statute, find an affirmative obligation on management to actually consult with the joint committee on health and safety matters.

I don't mean you to take the time now, but...

10 A. I don't really understand the point that you are making in the terms of the powers that are given to the committees to make recommendations, the requirements placed upon employers to co-operate and to provide information, the way in which the Designated Substance Regulations require the employers to seek the advice and to indeed consult with the joint health and safety committee in the development of the undertaking of the assessment, in the development of the control program.

15 I think that if you took the whole scope of it you would have to...I would have to disagree to some extent.

Q. It was a point made by Professor Doern, in one of his two papers.

A. That doesn't help me.

20 Q. Can we turn to section twenty-three for a moment? I'm sorry, section...section twenty-three, the work refusal section.

25 Can you help us and give us any sense of how effective you think this section is when we are dealing not with a discrete accident at the workplace, but when we are dealing with a toxic substance? And just how the work refusal section will operate in those circumstances?

A. Thinking back to your previous question for a second, I just reference section fourteen (2) (d) of the Act, that says:

30 "The employer, without limiting the strict duty imposed by subsection one, an employer shall afford assistance and co-operation to the

5 A. (cont'd.) "committee and health and safety representative in carrying out, by the committee health and safety representatives, any of their functions."

It may or may not assist in the resolution of the issue, but there is clearly a duty to work with the committee in the exercise of their own statutory power. It is set out within the Act.

10 DR. UFFEN: Do I understand the point is in that what it doesn't say - shall ask the advice of the committee?

It says co-operate, give information, do all that, but it lacks...have I grasped the notion now?

15 MR. LASKIN: Well, I think the concern expressed by Professor Doern was that, rightly or wrongly, I'm not judging it, but he suggested that there may be some health and safety matters that will never get to the committee, that should get to the committee, because there isn't a positive initiating obligation, if you will, on management to make sure they get there.

20 THE WITNESS: If you would like to pursue that, what do you think should be the content of that? Do you think the Statute should say that there should be specific things that management should consult workers with?

25 So I can't answer your question. I think that the regulation...if you take the Lead Regulation, it does impose a duty to consult.

Q. Or mercury.

A. Turning to your next question, dealing with toxic substances and the refusal to work.

30 I recall, I think, that that was discussed with a couple of the other ministry witnesses, and I'm not sure that I would have any more practical information to provide to the

A. (cont'd.) Commission other than what they have already given.

5 Is there something that, in the previous testimony, that you would like...?

DR. DUPRE: With respect to what, Mr. Gladstone?

THE WITNESS: The refusal to work and the way in which toxic substances are handled.

10 Is that a correct observation on my part? I would be willing to discuss it, but it would not necessarily be from a totally practical point of view. I can tell you what I think should happen.

15 DR. DUPRE: Mr. Gladstone, as you know your expertise and background is such that if you volunteer something, exactly the way you have now, you would be happy to share with us what you think should happen, I, for one, am all ears.

Will you tell us what you think should happen?

THE WITNESS: Sure, or what may happen.

20 The section does provide for workers to refuse to work when they believe that their health may be endangered, and that may be from any source in the physical environment, whether it's a machine or a dust or a fume.

25 Of course, and I'm taking this in terms of an industrial establishment or a mine or a construction site, because the Act does differ when police or firemen or people employed in hospitals are concerned...among others.

30 The Act does say that when a worker does have reason to believe that any equipment, machine, device or thing he is to use or operate is likely to endanger himself or another worker, or the physical condition of the workplace or the part thereof in which he works or is to work is likely to endanger himself, or any equipment, machine, device or thing he is to use or operate, or the physical condition of the workplace or the

THE WITNESS: (cont'd.) part thereof in which he works or is to work is a contravention of this Act or the Regulations, and such contravention is likely to endanger himself or another worker, he has the right to decide that his life is endangered, another worker's life is endangered, health is endangered, and refuse to work.

The procedure would be simply that if that's the case, there are steps set out within the Act that he should follow in bringing that matter to his supervisor's attention, obtaining the assistance of another worker representative or a joint health and safety committee member, and seeing that the matter is resolved to his satisfaction, and when that is not the case, to either himself, the trade union involved where there is one, or worker representative, or the employer, can call in the inspector.

Now, in terms of toxic substances, the...and I guess dust in particular...I think that our practice in the ministry has been that we dispatch an inspector and many times dispatch an industrial hygienist at the same time, so that when they investigate the industrial hygiene problem that has been raised with the ministry, that the expertise is available to try and resolve that matter to the requirements of the law.

At that time there is a second test that is applied. The first test, the initial stage is reason to believe, the second test is, I think, in subsection twenty-three (6), and the test is reasonable grounds to believe, and that is a more, it has been said, a more objective test than the first.

There have been occasions when the ministry has not dispatched the technical expertise necessary to make that objective test soon enough, and we have received complaints from employers, and on the other side from workers, from time to time that we have not responded as quickly as we should have to make

THE WITNESS: (cont'd.) that determination.

Once the inspection is complete, a decision is made whether or not the workers are protected...well, whether or not the requirements of the law have been met and whether there were grounds to believe that, and that the conditions found were acceptable or not.

MR. LASKIN: Q. I take it if the process goes its full route, I mean fairly speaking in terms of toxic substances, you are talking at least in terms of days rather than hours to resolve that matter?

I mean once you get an inspector in who is going to do the necessary sampling and get the results back and so on.

THE WITNESS: A. I guess it depends on the issue at hand, or the circumstances of the workplace. In some cases I would say that it may be, it may take time to get the results of air sampling. In the meantime, there are measures that can be taken to protect workers, under other provisions of the Statute and Regulations.

Q. There is nothing in the Statute, I'm correct, that addresses the question of pay for a worker who has exercised the right to refuse work?

A. What do you mean?

Q. Pay from the employer. If I exercise the right to refuse unsafe work...

A. Yes.

Q. ...and then one issue that may arise is that if you exercise that right and you are off the job for some days, there is nothing in the Statute that addresses the question as to whether or not the worker is entitled to pay during that period of time?

A. Well, first of all, the Act prohibits reprisals by employers, in section twenty-four. Second of all, it says

5 A. (cont'd.) that the man may be assigned alternative work if there is such available, and that anyone who does the work in his place has to be told that that's the case.

If you are implying that in the interim between the time the test is taken and the time the man is, the decision is made, I don't know. I would have to inquire further, but I would assume that the man is protected by the provisions of the Act.

10 Q. Can you see if there...what I would be interested in is whether there is an interpretation bulletin that addresses the question of whether failure to pay is equivalent to reprisal, and I ask the question in the light of a number of arbitration awards in other jurisdiction, in other tribunals, in which arbitrators have said if you exercise that right, you can't be paid.

15 Without taking the time, Gunderson and Swinton go through the various arbitration awards, and that's really what I was coming to because it seems to me that when you are talking about safety matters, discrete matters, and one can in the normal course hope that they will be resolved, even with the intervention of an inspector, quite quickly.

20 When you are talking about toxic substances, I can see that there might be certain situations in which even with the best intentions of all parties, the resolution of that matter may take some number of days.

25 It would seem to me an inhibiting factor on a worker exercising that right if, amongst everything else, he knows he is not going to get paid, at least up until the time the inspector rules.

30 That's the only reason I raise the question.

A. Have you got an example?

Q. The only example I commend to you is reading

Q. (cont'd.) the section of Gunderson and Swinton where it goes through the various arbitration awards.

A. In Ontario?

Q. In Ontario.

A. Dealing with...

DR. DUPRE: Dealing with the subject matter.

MR. LASKIN: Q. A separate question. Can you tell us what role the Ministry of Labour sees itself playing in terms of the training and education of members of health and safety committees, worker representatives, so on?

THE WITNESS: A. Well, as you know, there is...I believe there is a statutory basis for training and education, in the Occupational Health and Safety Act.

Education is the responsibility...if you are just dealing with the legal framework to begin with...of associations established by employers under the Workmen's Compensation Act, section 119, and there are now nine of them in the province, and these associations provide training in matters of health and safety, including joint training to members of health and safety committee members.

The ministry has also taken the position, I believe, that applied research and manpower training are important aspects of the development of health and safety in the province, and as such, through monies available to it, have made grants to the labour movement - the Ontario Federation of Labour, the Steelworkers, and I believe one other organization - to assist them in training trainers who would train health and safety committee members and representatives throughout their member organizations.

More directly, the ministry has recognized that the development of health and safety committees and worker representatives is something that has to be evolved. That Statute became law in October, became effective in October of 1979, and

5 A. (cont'd.) overnight there was a requirement for places, organizations made up of people to get together, to work together, to do the things that the law requires them to do, and I think it's fair to say that the first task that the ministry went through is making sure that the committees, where they are required, are set up.

10 Once this was done, I think that it became apparent to us that there were problems in some committees...the quality of the interrelationships wasn't what we had hoped, that things could evolve with our assistance, and I think it's fair to say that the special advisor on industrial relations, and his assistants, have devoted very considerable portions of their time to working with companies and joint health and safety committees to improve the way in which they function and to get the
15 relationships between the parties to such a level that, I guess, the role envisioned in the Act is fulfilled in the workplace.

I guess the final thing I would add is that the inspectors, in the course of their work, do identify areas where, committees where there are problems, and have started to
20 refer them up the chain so that assistance can be obtained, so we can work with these committees and with the employers to improve their performance.

MR. LASKIN: Q. I know the Statute addresses the question of paying committee members for the time they are carrying out their duties and so on, and just going back to Ham
25 for a moment, did Ham, in terms of any discussion within the ministry, was the question of paid time for training, preparation for committee meetings and so on, discussed or addressed?

THE WITNESS: A. I don't know.

Q. The Statute, I'm correct, is silent on that
30 aspect, is that right? In other words, there is nothing in the Statute that pays a committee member to go out and take a two-day

5 Q. (cont'd.) training course? I mean, there is nothing that says he gets his regular wages, nothing that says he gets his salary for preparing for committee meetings and so on?

A. I am not sure that that has ever been tested.

Q. It's never been tested?

10 A. There isn't...not to leave the impression that there is such provision in the Act - no, there isn't that particular requirement that the two-day training for health and safety committee membership required by Statute.

15 I don't know if that question was ever put to us whether or not there are other powers under the Act that would lead to a sympathetic interpretation or not as to whether that can be done.

20 If people are trained jointly as health and safety committee training sessions run by the company, by outside people, by the safety association, on company time and both parties are there, it would be my assumption that their people are getting paid for being there. It's a joint health and safety committee training session, and the employer made arrangements for the parties to go to the training course, so I would assume he is footing the bill.

But whether or not this has ever been, you know, tested, I'm not aware.

25 DR. DUPRE: Dr. Mustard?

DR. MUSTARD: Well, I would like a little later...

MR. LASKIN: Sure, go ahead.

DR. MUSTARD: John's got a line of...

MR. LASKIN: No, go ahead.

30 DR. MUSTARD: To change the subject slightly, that is pertinent to some of the things we have to do since we are on to the legislation, Mr. Gladstone, you may have already given this

5 DR. MUSTARD: (cont'd.) information, but it would help me if you could give some feeling as to how comfortable the ministry is with knowing what plants exist in the province and what substances they use...let's say when a substance is regulated.

How do you find out who is using it in the system, and then how do you ensure that joint committees have been established. I have had a bit of experience with some of those.

10 THE WITNESS: I assume you are talking only where Designated Substance Regulations are involved?

DR. MUSTARD: Yes.

THE WITNESS: How?

15 DR. MUSTARD: How do you know who is using, let us say lead, and how to you know whether they have got joint committees within those organizations?

20 THE WITNESS: We have devoted considerable time and effort to answering those two particular questions, and the ministry has compiled a list based upon all the sources that it's aware of, that could tell it where lead would be used in a particular type of industry, and we, over the course of time, have developed our own lists of companies that have used lead.

25 We have been in the business for decades. Lead has been a health hazard for quite some time, and once the Lead Regulation was in place and once a reasonable period of time had passed so that it could be assumed that the law would be complied with, we went out and visited all the plants and found out whether or not assessments had been conducted, whether or not the control program was in place, whether or not the joint health and safety committee was there, among other things.

30 Where we found that wasn't the case..and I think it's fair to say that there were times where it wasn't the case... we left orders to see that it's done, and we're following it,

5 THE WITNESS: (cont'd.) we are tracking the Regulation on a quarterly basis to make sure that the requirements of the Lead Regulation, for instance, are being complied with.

10 DR. MUSTARD: Supposing I operated a plant in a smaller community, with a nonunion labour force, and was using asbestos, and neither my management...I guess mainly myself as the manager, possibly...nor my labour force, was particularly aware of what was taking place in terms of this having a responsibility to do so under law, but we are not alert to it, is it possible that I could operate a plant in which neither the work force nor the manager were aware of the legislation, and that it would be undetected in that sense?

15 THE WITNESS: Asbestos isn't a designated substance.

DR. MUSTARD: No, but if it were. Let's use lead as the example, then.

THE WITNESS: Let's say...

20 DR. MUSTARD: Use lead as an example. I'm just trying to use a theoretical model system. How does one ensure that all operations can be detected in the system?

25 You have a list, but it doesn't necessarily say that you have a list of all the people using lead. You may, through some technique, but my question is how one detects the operation that may be working in the province, that was using a substance which was a designated substance, and neither the management nor the work force were aware of their obligation.

THE WITNESS: Well, I would hope that our inspection system, which I think Mr. Melinyshyn described both in the industrial and in the construction industry, would pick up those places.

30 Our inspectors, although they are generalists, have been working in the field for a while and have been given training, have recognized these types of hazards.

5 THE WITNESS: (cont'd.) As I mentioned this morning, things like asbestos and lead and benzol and fluorides and enzymes were listed in the Regulations under the Industrial Safety Act long before the Occupational Health and Safety Act was in place, and over time our inspectors have left with companies long lists of chemicals and have asked them to identify in their workplace what chemicals they have, that they establish their own internal control program for these chemicals, that our inspectors have since then been asked to record on their inspection reports the presence of some fifty-odd chemicals that we believe require some attention, and there are thousands in the field, but these are the ones that for practical purposes we thought should be identified to us, and as we move around the province, through workplaces and through other contacts we have through the Workmen's Compensation system and other organizations, these types of workplaces become known to us.

10 DR. MUSTARD: I appreciate that. But let me try to push you a little bit and ask you to put on your hat of having worked at the Ham Commission, in trying to look at this, and also the documents that we have received, the research reports, which suggest that for the operation of the joint responsibility approach to the system, that an organized labour may be a better advantage than nonorganized labour in trying to address some of these questions.

15 I'm trying to get a bit of education and understanding that still, if a government goes out and tries to inspect, it is still dependent upon what it picks up from the system. It may get a hundred percent, it may get ninety-nine percent or ninety-five percent.

20 But coming back to the joint committee and the joint responsibility question, it's the idea of having an educated work force to be aware of the substance in the place,

5 DR. MUSTARD: (cont'd.) then does that not give a better advantage than try to have the thing brought to somebody's attention that this substance is being used and it hasn't been picked up in the system?

You don't follow me?

10 THE WITNESS: My reaction would be, if that substance happens to be in the workplace and our inspector happens to pick it up, and it's reported on the inspection...

DR. MUSTARD: Oh, sure, if the inspector gets in.

THE WITNESS: ...then you can say that would be made known to the employers and workers.

15 DR. MUSTARD: I'm trying to get to a situation... there are a lot of operations...will your inspectors get into all the operations in the province that may be using a substance in a time frame, the number of companies that might be using something could be very small and they may be easily identified, the number of companies that might be using something...I'm admittedly being theoretical...could be considerable. You have a limited number of inspectors. How can one ensure that you
20 get the match?

25 What I'm really trying to get at is this question of an educated work force in terms of the operation of the Act, in both trying to determine whether a substance is used in the workplace, and the problems that may occur if the work force has not had sufficient education to be able to recognize something and be aware of what is going on in the system, and the point that is made in one of our research reports of the advantages of an organized labour movement being able to do this, versus having a labour movement that doesn't have that.

30 Maybe I'm using the wrong example for you, and I'm not trying to get at the ministry's own operational system,

5 DR. MUSTARD: (cont'd.) I'm just trying to get at the application of the Act overall to ensure that you give reasonable protection, perhaps, to small workplaces which may use something that is hazardous and for some reason they are not aware of it, and I believe it does occur in the system, and that whole dilemma of the education of the work force to make the Act operate.

10 THE WITNESS: Well, that's an important point that will, I believe, evolve over time, and in terms of mechanisms that are in place, we use, besides the inspectors, we try and heighten awareness through our advertising program through the mass media, through the use of trade journals and other mechanisms to get the message out to people that they have
15 responsibilities under the Act, and once this phase of the program is complete, there will be a second phase, I would imagine, that would deal with some of the more specifics that are important - if you want to pick one - chemicals in the workplace and what do you know about it and what are you doing about it, would be a caption.

20 Safety associations, although they are run by the employers through the Workmen's Compensation Act, have set up quite a complex network of contacts at the plant level, at the county level, and through their own advertising system and their own training programs that apply to its complete membership, and if you take the standard figure for some industries of maybe
25 thirty-three percent are organized and...whatever it is, sixty-six percent...are unorganized, they would be devoting most...I don't know, it may be that if that balance is true they would be giving a lot of attention to unorganized workplaces, and making sure that the information would be getting down to the smaller plants.

30 I know that the ministry, having received advice

5 THE WITNESS: (cont'd.) from the advisory council on the problems of small plants, has been working on ways and means of getting the message down to smaller plants and working with the associations.

DR. MUSTARD: I guess I...

10 THE WITNESS: And I would also add that the media and the labour movement itself has got the message across around... from my reading of the newspapers, and that's just not Toronto newspapers, but newspapers across the province, there is a steady stream of concern shown by the labour movement about the way in which the Act is going and problems that they have encountered, and I think that that itself has a salutary effect on others that may not be directly involved in the problem, but as case studies would indicate, that it's only by the grace of God, perhaps, that it wasn't me, in some instances.

15 DR. MUSTARD: Let's simply summarize that then. Informing the worker is largely dependent upon, I think, four activities - the safety associations, your own ministry's publicity, the work or organized labour and whatever events take place in the media.

Is that covering the four major...

THE WITNESS: No, I think you've left out one.

DR. MUSTARD: Okay. What did we leave out?

25 THE WITNESS: Sometimes employers who inform their workers about what goes on in the workplace, and that...

30 DR. MUSTARD: The employer...certainly, I can see that...an employer program. So that is there any attempt or any information about attempting, preparing people for careers in the work force, in any of the programs in any of the trade schools, etc., now to introduce formal education about these substances into those programs?

THE WITNESS: I'll approach it from a general..
from the general and then go to the specific.

5 In terms of the general, the Apprenticeship Acts
that exist refer to specific requirements in the Statutes. In
terms of the Occupational Health and Safety Act the question that
has been raised by the advisory council, as one example, is the
extent to which that kind of information is actually integrated
10 and used within the training of apprentices, and we've had dialogue
with this group from time to time to make them aware of our
Statutes.

I think that our people have even participated
in some of these training programs.

15 I don't know...it could be checked...the extent
to which there is specific reference made, for example, to
asbestos. I have never attended one of the training programs.

DR. DUPRE: Could I just pursue the line of
questioning Dr. Mustard has been developing, simply making
sure I understand the current position?

20 I take it that section twenty-one is very
material here in that this section imposes a legal obligation
in the sense that no person shall manufacture, distribute or
supply any new biological or chemical agent, or combination of
such agents, unless he has first submitted to the director notice
in writing of his intention, correct?

25 THE WITNESS: Correct.

DR. DUPRE: Incidentally, in terms of current
organization, what is the division to which this notice in
writing must be submitted?

THE WITNESS: Right now it's submitted to the
director of the occupational health branch.

30 DR. DUPRE: So that's the director of the

DR. DUPRE: (cont'd.) occupational health branch.

Okay.

5 THE WITNESS: It may be submitted to any other director, but it's the director of the occupational health branch that is responsible for this particular section.

DR. DUPRE: Now, again looking at section twenty-one, I note in subsection three,

10 "For the purpose of this section, new biological or chemical agents, or combination of such agents, means any such agent or combination of such agents other than those used in one or more workplaces, and included in an inventory compiled or adopted by the ministry."

15 In terms of the current organization, where is the inventory that is to be compiled and adopted by the ministry kept?

THE WITNESS: The inventory is kept in the ministry library, in the ministry offices, and copies have been made available.

20 DR. DUPRE: That's not what I really meant. What division in the ministry has the responsibility for compiling the inventory?

THE WITNESS: The ministry did not compile inventory. Last January...January of 1981...the ministry adopted an inventory, the EPA inventory of, I think it's the June, 1980 edition, and such notice was published in the Ontario Gazette.

25 DR. DUPRE: Okay.

So the inventory, then, is an inventory that has been adopted by the ministry, as the Act describes. That is the EPA inventory which is simply updated from time to time as EPA updates its own inventory?

30 THE WITNESS: No. No, this is an inventory that was adopted at a particular point in time. Thereafter, whatever

THE WITNESS: (cont'd.) adoptions or compilations are made will be made by the Ministry of Labour.

DR. DUPRE: Okay.

THE WITNESS: It's my understanding that when EPA, under the TOSCA Act, under TOSCA, changes, updates, that that's what is going on in the United States. In Ontario, we have the EPA of June, 1980, and from then on it's us.

DR. DUPRE: Okay.

Now, what division has that responsibility?

THE WITNESS: The occupational health branch.

DR. DUPRE: It's again the occupational health branch.

THE WITNESS: Yes.

MR. LASKIN: Q. Is there some...subsection two of that section, of course, requires an assessment to be made by the proposed user of the product before, I take it, the product can get on the market. Is there some regular body within the occupational health branch, within the ministry, that is going to deal with those assessments and consider them?

THE WITNESS: A. There is a mechanism within the branch to deal with the review of information that is provided. There is a person assigned full-time to do that, and the person's supervisor is also involved, along with the director.

Q. And that is a person within the occupational health branch?

A. Yes.

Q. With full-time responsibility for...

A. I think it's...if not full-time, almost full-time responsibility.

Q. For considering assessments?

A. Yes. And obtaining the information that would

A. (cont'd.) be necessary for the director to reach whatever decision he has to make.

MR. LASKIN: Dr. Uffen?

DR. UFFEN: I don't want to jump around too much, but I had a question that is worrying me, about inspectors.

The Act provides, I think in section thirty-three and other places, that nobody can obstruct an inspector from his legitimate duties.

THE WITNESS: Correct.

DR. UFFEN: What do we do, though, about the case where an inspector in such legitimate of activity is in danger of exposing himself to a hazard that he may be unaware of?

I can think of two examples - he is looking for one hazardous substance, with which he is familiar, but he may inadvertently put himself in the presence of another hazardous substance or situation.

Does the Act have anything to say about the employer having a responsibility to alert him to this, or warn him off, or does some other legislation look after that type of thing?

THE WITNESS: I don't know about the legal requirements, but perhaps in practice it is my understanding that generally the inspector is accompanied by people from the workplace, who would know, basically, what's around.

I would think that they would be in a position to tell him when he is endangering them, not only himself.

But I don't know.

DR. UFFEN: You know, as a novice I see the possible conflict between section thirty-three, one, two, three, saying you mustn't hinder, obstruct, molest, interfere, etc., and the company official that's going around with him knows damn well if he opened that door he may fall down a shaft, or

5 DR. UFFEN: (cont'd.) if he goes into that room, that he may expose himself to radiation. So he says to him, don't do it, and the fellow interprets it as interfering in his right to inspect. Would you take that to court?

THE WITNESS: I would hope that the inspector would ask why.

DR. UFFEN: Yes, all right.

10 THE WITNESS: And if it's a reasonable answer, find out how they can get the information that's necessary.

I think if you asked me...

DR. UFFEN: Have there been any examples...

15 THE WITNESS:...if employers have obstructed our inspectors occasionally, it has happened, yes. and we have taken them to court and we have won.

DR. UFFEN: Have there been any examples of the type that I suggested, or is it a nonproblem?

20 THE WITNESS: I don't know. I would assume that they would ask, you know, what's behind the door and...I don't know.

DR. UFFEN: All right.

25 Well, it just worries me when I read legislation like this, which is quite meticulous in protecting the rights of the inspector. Maybe there ought to be another one in there that makes sure that the company doesn't let him get into any difficulties in doing it.

THE WITNESS: As a layman, could I ask which would take precedence, and could the latter be used as an excuse?

30 DR. UFFEN: Yes, it could work both ways, though. If you had such a section in, it could be debated in the court. If it isn't in, it could be debated in the court. You know, maybe it just has to be solved in the court.

At the risk of jumping around, I wanted to ask

DR. UFFEN: (cont'd.) about offences and penalties.
Would you rather I wait until later on?

MR. LASKIN: No, no. By all means go ahead, Dr. Uffen.

DR. UFFEN: Okay.

Again, I read down section forty-one, which deals with exemptions. Paragraph two, number three. Do I understand this, that the Lieutenant-Governor in Council may exempt any workplace, industry, activity, etc., from the provisions of this Act?

MR. LASKIN: Regulation?

DR. UFFEN: It's part ten regulations. Are these page numbers? Page thirty-six. Yes. Page thirty-six of the Act, the second paragraph from the bottom.

"The Lieutenant-Governor in Council may make such regulations as are advisable for the health or safety of persons in or about a workplace.

(2) Without limiting the generality of subsection one, the Lieutenant-Governor in Council may make regulations.

(3) Exempting any workplace, industry, activity, business, work, trade, occupation, profession, constructor, employer or any class thereof, from the application of a regulation or any provision thereof."

DR. DUPRE: The Regulation, not the Statute?

THE WITNESS: Just from a regulation. You develop a regulation for X, and say that it doesn't apply to a particular type...it applies to everyone but this type of industry.

MR. LASKIN: Q. As, for example, construction and

Q. (cont'd.) the proposed asbestos regulation?

THE WITNESS: A. Yes.

DR. UFFEN: Just from the regulation?

THE WITNESS: Just from the regulation.

DR. UFFEN: Am I being naive that if government, through order-in-Council, made enough of them, just keep exempting a workplace from regulation after regulation, until the Act was ineffective?

THE WITNESS: That's just supposition.

DR. UFFEN: Yes, I guess it...it looks to me, nonlegally trained, that it's a clerical loophole you can drive several trucks through - tractors, trailers, semi-trailers, double-bottomed, triples.

THE WITNESS: We haven't exempted the trucking industry.

MR. LEDERER: Mr. Chairman, I wonder if I just might make a comment that I think may be of assistance here and may provide a practical example of where this kind of section exists and has been acted on, I suspect, more than in these circumstances?

I'm not sure that this really does apply to a circumstance such as exempting, by the regulation, the construction industry. I think what may happen there is, as the evidence is before this Commission, that there may be a separate regulation. The original regulation simply doesn't apply to that particular type of industry.

There may be circumstances, however, where for practical reasons applicable to a particular site or to a particular business, the regulation ought not to apply, and the ministry may...the Lieutenant-Governor in Council, rather, may then, by specific regulation, exempt. And one sees that happen under the Environmental Assessment Act, where under that

5 MR. LEDERER: (cont'd.) Act there are certain undertakings, is the word used in that Act, to which it should apply, and yet there is a provision which allows for exemptions. In that case there are some exemptions which have taken place, and what really is said there is, in this particular case this Act shall not apply, but it's much more direct, I think, than in the rather general context of to particular industries, as in the construction example with asbestos.

10 I'm not sure if that's of any assistance or not.

DR. DUPRE: You mentioned the trucking industry, Mr. Gladstone. Has that been exempted by Regulation?

THE WITNESS: No it has not. I said it hadn't been.

15 DR. UFFEN: May I pursue it just a little further...

MR. LASKIN: Sure.

DR. UFFEN: It may not be trivial and it may be trivial, I haven't any way of knowing whether it's trivial, but if we look at some important regulations such as Regulation Four that deals with the fiber counts...

20 THE WITNESS: Section Four of the Asbestos Regulations?

DR. UFFEN: Section Four of the Proposed Regulations, which is tab seven in our document, and Section Four deals with the number of fibers per cubic centimeter of different kinds of asbestos that are permissible, and time-weighted averages and maximums, and all the rest.

25 THE WITNESS: Yes.

DR. UFFEN: Which I would draw the conclusion it is an important regulation.

THE WITNESS: Yes.

30 DR. UFFEN: All I want to get to understand is, the government, by order-in-Council, could exempt any workplace,

DR. UFFEN: (cont'd.) industry, activity, etc.,
from Regulation Four. Have I understood it correctly?

5 THE WITNESS: My reading of that Regulation is that
I would have to look at the application section of the Regulation.
It would tell me which employers are covered by it, and that would
be Section...

DR. UFFEN: Maybe we should look at that.

10 THE WITNESS: That would be Section Three of the
Proposed...tab seven.

MR. LASKIN: Tab seven. Have you got it?

THE WITNESS: Yes.

15 DR. UFFEN: For the purpose of clarifying my
understanding, may I suggest that we are dealing with an employer
and workers in a place where asbestos is present, processed, used,
handled or stored.

Then Section Four presumably would apply...I'm
sorry, Regulation Four would apply.

THE WITNESS: Section Four of the Proposed Regulation
would apply, yes.

20 DR. UFFEN: Yes.

THE WITNESS: Yes.

25 DR. UFFEN: So, I've got a case where the
Regulation Four would apply, and it's in the correct location.
I'll just go back and say that my understanding of the original
Act is that the Lieutenant-Governor in Council could exempt
such place.

You could drive the whole CNR and CPR through that.

THE WITNESS: I guess they could make a regulation
that would say that the previous regulation doesn't apply to
XY or Z, if there is some reason to.

30 DR. DUPRE: Well, indeed, you know, regardless of
what you are driving through it, I would just put this to you,

5 DR. DUPRE: (cont'd.) Mr. Gladstone, so that
you can give me such reaction as you wish to give: Precisely
with respect to your Proposed Asbestos Regulation, which has,
of course, a certain numerical standard that is laid down, and
that then has an application section, as I would take this,
because it refers to the capacity of an order-in-Council to
exempt any workplace, industry, activity, business, work, trade,
occupation, etc., I would take this as certainly making the
10 following possible, for example: That by order-in-Council,
once your Asbestos Regulation was in place, cabinet might choose,
for instance, to exempt from the reach of the Asbestos Regulation
at the levels that are laid down there, particular maintenance
workers in a particular asbestos plant owned by a particular
company.

15 THE WITNESS: That power exists.

DR. DUPRE: That is what I wish to ascertain.

And at this point whether this is a loophole, or
whether it's something else, it's a matter that we could turn
our own minds to. The fact of the matter is that, as I look
20 at it, it is plainly envisaged here that the Lieutenant-Governor
in Council indeed should have the authority to make some
specific exemptions as the Lieutenant-Governor in Council may
determine from time to time...and getting down to that level
of specificity, as I read the words.

25 THE WITNESS: I read the words here...

DR. DUPRE: Does that make sense to you, Mr.
Lederer?

MR. LEDERER: Absolutely. Yes.

THE WITNESS: But of course it wasn't written
with the Asbestos Regulation in mind.

30 DR. DUPRE: Of course it was written, like all
good legislation..

THE WITNESS: To cover a wide possibility.

5 DR. DUPRE: ...should be, to cover a full range
of general situations.

MR. LEDERER: Mr. Chairman, if I might be allowed
one gratuitous comment, I think it's actually...there is nothing
unusual about that section. It's quite customary to find it in
most legislation. It's...

10 DR. DUPRE: I, indeed, am fully aware of that
counsel, thank you.

MR. LEDERER: Thank you, sir. Sorry.

DR. UFFEN: So am I. That's why I saw it.

15 MR. LASKIN: Q. So just quickly on toxic
substances, I take it the scheme of the Statute on toxic substances
is really three part. Number one, before a toxic substance can
be introduced you have to go through the exercise and comply
with the provisions of section twenty-one, and that's what the
Chairman was questioning you on.

20 Secondly, once the substance is in the workplace,
if one of your directors deems it to be potentially dangerous,
he can act under section twenty and with respect to certain
substances, such as asbestos, he can go the entire route and
that substance can be designated and then you have the full-
blown process for reaching a regulation for a designated substance.

25 There is a three-part regulation of toxic
substances.

THE WITNESS: A. There is a three-pronged
approach.

Q. A three-pronged approach.

A. And there is a fourth.

Q. I missed a fourth?

30 A. It has to do with the general regulations
that exist for mining, construction and the industrial sector,

5 A. (cont'd.) that do have provisions that deal with the control of chemical and physical agents, and are used quite extensively in the province.

Q. Okay. But section twenty-one addresses getting the substance into the workplace. Section twenty addresses the power of the director, as long as the substance is not designated.

A. Correct.

10 Q. Section twenty doesn't operate, for example, with respect to lead, mercury and, once asbestos is actually designated, will not operate?

A. Correct.

Q. Okay. So is the fourth prong that you are talking about applicable to both designated and nondesignated substances?

15 A. Well, I think that there is a principle in law that the more specific applies and the more recent applies, and in both cases a designated substance would be certainly more recent and more specific than a general regulation that would deal with chemicals, and you would expect that the general regulation...the specific designated substance regulation would
20 be used to make sure that the substance is controlled to the exposure limit that is set out in the law, and that the protective requirements that are set out in the regulation are complied with.

25 And those are far more specific than anything in the general regulations, either for industrial, construction or mining.

Q. All right.

30 Is there...and you can help me on this...when we deal with substances proposed to be designated, apart from the advisory committee is there any body within the ministry that is doing its own assessment of a particular substance, such as

5 Q. (cont'd.) asbestos or vinyl chloride, or
whatever it may be...is there any kind of relatively-permanent
body within the ministry that makes some kind of assessment with
respect to a proposed substance, and if so, are there guidelines
as to the kind of assessment that is being done?

10 A. In the first instance, I think the standards
and programs branch is responsible for working on the development
of materials for the identification and control of particular
chemicals, and they...this branch works as part of the
occupational health and safety division and draws upon the
expertise that exists in the occupational health branch and
the special studies and services branch, and indeed that exists
in the line inspectorate.

15 So that's the answer to the first question, and
in terms of substances other than those that are presently...
that have presently been proposed for designation by notice
in the Ontario Gazette, there is a long...long...there is a list
of chemicals and physical agents that the ministry is working
on, that there have been contracts let to outside organizations
20 to collect information both in terms of the perceptions of
the parties of the extent of the hazard, the use of the substance,
the types of controls that are in place and the controls that
are necessary, and also a separate line of inquiry dealing
with the nature of present exposures in the workplace.

25 So for substances other than those that
have been identified as designated substances, there is, I would
say, a far more sophisticated approach underway than was used
for the first set of substances which evolved over time.

DR. DUPRE: Perhaps this might be an appropriate
moment at which to rise until two-fifty?

30 MR. LASKIN: Sure.

THE INQUIRY RECESSED

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THE INQUIRY RESUMED

5 DR. DUPRE: Counsel?

MR. LASKIN: I'm going to withhold any more questions, Mr. Chairman, until my friends have had an opportunity to question.

DR. DUPRE: Okay, fine.

10 Can I just ask one question before I ask for the batting order, Mr. Gladstone?

You are, I know, a very knowledgeable person with respect to the 1978 Act. May I ask you the following: I understand that the Act of designating a substance by formal regulation can thereafter regulate exposure to that substance in accordance with standards of exposure, numerical standards of exposure.

15 From your knowledge of the Act, is it possible for you to briefly convey what other consequences flow from the designation of a substance?

20 THE WITNESS: Apart from establishing an exposure limit?

DR. DUPRE: Apart from establishing an exposure limit.

25 THE WITNESS: The employer is obligated to conduct an assessment to determine whether the substance is present, to determine whether or not...

DR. DUPRE: Can I just take it slowly? The employer is obligated to...?

30 THE WITNESS: To conduct an assessment...assuming the regulation applies to him, under section three, he has to conduct an assessment to determine whether or not...the extent of worker exposure to the substance, and consult with the joint

5 THE WITNESS: (cont'd.) health and safety committee
on this, on the assessment. If there is a dispute, there is a
mechanism for the ministry to be called in and make a decision
on that.

10 If the assessment reveals that workers' health
may be endangered by exposure, the employer is required to
establish a control program which sets out specific requirements
such as monitoring, record keeping, monitoring of worker
exposure, the concentration of the substance in the air,
record keeping, medical surveillance, among other things.

That's section seven of most regulations and
it sets out again the requirement of consultation and provides
for dispute resolution under section nine of the regulation.

15 The regulation then deals with the matters of
monitoring, of record keeping and what happens to the records,
how long they are kept, who has access to them, then provides
for a means whereby where workers, as a result of a medical
surveillance program, are found to be...found to have a condition
that could be a condition resulting from the exposure to the
20 substance, could lead a physician to believe that special
measures would be necessary in terms of putting them in another
type of work where exposure is less to the substance, or not
at all to the substance, of that he should be removed from the
work, that he gives the employer such direction, that the employer
is bound to follow such direction, and if the man is removed from
25 work, the provisions of the Workmen's Compensation Act with
regard to the protection of the worker's wages would apply.

30 I believe that in most cases the provision of
information to the joint health and safety committee concerning
the results of those medical surveillance programs are required
and depending upon the substance, the specific results of the
biological test may be provided to them...for example, in the

THE WITNESS: (cont'd.) Lead Regulation, the results of blood and urine tests are provided, to be given to the joint health and safety committee on a confidential basis.

In this sense, we treat the joint health and safety committee as an institution separate and apart, something of a legal mandate of itself, under the Act.

Those are the basic consequences that flow from the application of the designated substance regulation to a particular workplace.

MR. LASKIN: Q. All of those items that you mentioned are found within the regulation itself?

THE WITNESS: A. Yes. And I should say they adopt codes that indicate how the substance is to be measured, what procedures are to be used for the analysis of the substance when biologic samples are taken, what respiratory equipment is to be used and how it is to be maintained in particular circumstances, and provide for medical surveillance and outlines that.

I assume that when you talked about section four, you also talked about section five - the conditions under which respirators can be used. Section four specifically says that subject to subsection five, respirators may not be used for... to comply with this provision of the regulation.

DR. DUPRE: You are referring to the section of the regulation.

THE WITNESS: The only designated substance regulation, yes.

MR. LASKIN: Q. The only statutory provision that is triggered, I take it, is the one that mandatorily requires a joint health and safety committee? That's the one statutory provision that is triggered by the designation?

THE WITNESS: A. As a result of designation, if

A. (cont'd.) it applies to your workplace, then a joint health and safety committee has to be established.

Q. And, I suppose, negative really, if the director has acted under section twenty of the Statute and then a regulation is designated, then section...a substance is designated, then whatever order may exist under section twenty no longer applies?

A. I...

Q. By virtue of the Statute?

A. I would assume that that's true, because section twenty doesn't apply to designated substances.

DR. DUPRE: I have no further questions just now. Can I have the batting order?

MR. STARKMAN: Yes, Mr. Chairman.

DR. DUPRE: Mr. Starkman, are you the leadoff?

MR. STARKMAN: I will be doing it.

CROSS-EXAMINATION BY MR. STARKMAN

Q. Mr. Gladstone, I'm not certain as to what your functions are at the ministry. I understand the title you have, but I'm not sure what that embraces.

A. It embraces the developments of policy and practice in all areas of occupational health and safety, within the occupational health and safety division. The particular matters that I work on vary from project to project.

Q. And you would be an advisor to the deputy minister?

A. I am an advisor to the assistant deputy minister.

Q. Does anyone report to you? Are you anywhere in the chain of command, or it's just that you work on specific projects and report to the assistant deputy minister, who then... it goes back into the executive chain?

A. That's correct. Yes.

5 Q. I'm curious about the ministry interpretation, or your interpretation of the meshing of the Occupational Health and Safety Act and the Workmen's Compensation Act, in specifically two provisions of the Act.

A. Which Act?

Q. The Workmen's Compensation Act.

10 Section 101, which is the section which provides...it's fairly lengthy, but in essence it's that the Board, meaning the Workmen's Compensation Board, has the right to enter the establishment of any employer who is liable to contribute to the accident fund, and basically to inspect the way it works, machinery and appliances to determine that they are safe, adequate and sufficient, and whether all proper precautions are taken for
15 the prevention of accidents to the employees employed in or about the establishment or premises, etc.

It seems that in this Act, section 101, which has been in place for quite a number of years, that there is the power in the Workmen's Compensation Board to enter into premises to inspect them and determine whether or not they are safe, and now
20 we have a corollative power in the inspectors under the Occupational Health and Safety Act, and I understand both Acts are administered out of the Ministry of Labour, in the sense that the Workmen's Compensation Board report is under the jurisdiction of the ministry.

25 So how do these two inspectorates mesh and is there reporting between the two of them on the inspections done by the WCB as opposed to the inspections done by the inspectorate under the Occupational Health and Safety Act?

30 A. I think you'll have to ask the Workmen's Compensation Board whether they have any inspectors appointed under that section of the Act.

Q. Are you aware of whether they have any inspectors?

A. I am only aware of the safety associations that have been established under section 119 of the Act.

5 Q. Are you aware of whether or not the occupational health and safety branch of the Ministry of Labour has had, or has conversation with the WCB concerning their obligation under, or their powers under, section 101?

A. I am not aware of any.

10 Q. You have never had any problems with intermeshing reports or intermeshing visits to plants, or employers complaining about too many inspectors, too many visits, etc., etc.?

A. I am not aware of any.

Q. Do you see any conflict between these two sections, or between these two inspecting authorities?

15 A. I'm not aware of any conflict between the two.

Q. Well, I mean...and I think...we haven't heard from the WCB, but it's our information that in fact they don't have inspectors and they don't do this, they have never done anything under this section, but nevertheless it's there, they have the power. So I'm asking you, if you like...

20 A. Well, I can't speak for the Workmen's Compensation Board, I'm sorry.

Q. I'm not asking you to speak for them. I'm asking you...

A. I don't administer the Workmen's Compensation Act.

25 Q. Yes. What I'm asking is, if they did actively use their power under section 101, do you see any conflict with the administration of the Occupational Health and Safety Act?

30 A. I think that it's purely speculation on my part as to what would happen. I do know that we have reasonable communications with the Workmen's Compensation Board, and if anything happened pursuant to that section, it would just be

A. (cont'd.) speculation again on my part, but I would assume that we would work something out. That's firstly.

5 The second thing is, based on practical experience with the way in which the safety associations, who have people who visit plants on a regular basis pursuant to their goal under section 119 of the Workmen's Compensation Act, that there isn't a conflict - that they have their role to play in terms of education provision, and we have our role to play pursuant to our
10 responsibilities under the Occupational Health and Safety Act, and I would say that the two activities complement each other, rather than lead to a conflict and duplication. I think they are both important functions.

Q. This is section 119?

15 A. Yes. I just used that as an example to show that it can work in one area. I don't see why it wouldn't work in another area, but I can't speak to that section of the Workman's Compensation Act.

20 Q. What about with respect to section 91, subsection 7? I don't know...I'll read it out, because it's reasonably brief. It says:

"Where the work injury frequency and the accident cost to the employer are consistently higher than that of the average in the industry in which they are engaged, the Board...etc.,...may increase the assessment for that employer by such percentage as the Board considers just, and may require the employer to establish one or more safety
25 committees at plant level."

I'm just wondering whether in the establishment of these safety committees, or the requirement, or possibility anyway, that the
30 Board could require the establishment of safety committees, whether there is in fact any conflict with the committees that are

5 Q. (cont'd.) established under the Occupational Health and Safety Act, or whether they are seen to be one and the same.

10 A. I'm not aware that since the Occupational Health and Safety Act has been in place that that section has been used. It hasn't come to my attention that that particular provision of that section, in terms of merit and demerit, that's a standard practice within the Workmen's Compensation Board system, and I think that if you read the reports that have been written in the last while by Dr. Weiler, and as you know, the whole Workmen's Compensation Act is under review right now, I'm not sure whether that particular aspect of the Act will remain. It's unknown to me.

15 Q. But really what you are saying is that insofar as this section is now in place, you haven't had any conflict between, potential problems between the committees structure as set up under this 1978 Act and this section of the WCB Act?

20 A. I don't know. I would assume that the powers under the Occupational Health and Safety Act and the mandating of committees in as many workplaces as have been mandated would certainly take care of a lot of places that wouldn't necessarily have had them...in other words, the requirements under the Act have superceded the provisions of the Workmen's Compensation Act, and...

25 Q. That's a question for legal argument. The normal procedure is not that one Act supercedes another...

30 A. Oh, no. No, no. I'm just talking about policy in terms of the likelihood of committees already being established. That section perhaps...and I again speculate...would be quite significant in the days when there weren't mandated committees, and where companies weren't performing well and committees might

5 A. (cont'd.) be one of the tools, along with the demerit system or the extra levy, that would encourage employers to work with their employees to achieve better performance in health and safety.

I think that in that sense they are complementary, but I don't know beyond that.

10 Q. Well, dealing with the committees that are established under the Occupational Health and Safety Act, I'm still a little unclear as to how the Act would, you know, really is designed to work - at least in theory.

Were you here the other day when Mr. Girdauskas entered exhibit number seventy-three, concerning an audit that had been done of the Hearne Generating Station?

15 A. I believe I was in the audience, yes.

Q. Well...

A. I have not read that exhibit.

MR. STARKMAN: Do we have...does anyone else have a copy that I can give to, refer Mr. Gladstone to?

20 MR. LEDERER: I have a copy. This is my copy, and it has been marked...

MR. STARKMAN: Well, I'm content just if you would show it to him.

MR. LASKIN: What's the exhibit number?

MR. STARKMAN: Seventy-three.

25 MR. STARKMAN: Q. Now, I'm just trying to get an idea as to how the Act would...is designed to work in theory.

Now, a worker has a right to refuse work that he has grounds to believe is unsafe to his health?

THE WITNESS: A. More than that. Where he has reason to believe.

30 Q. Where he has reason to believe?

A. Yes.

Q. In the initial instance?

A. Yes.

5 Q. All right. Let's just look at this list here, just as an example, because this is rather an ad hoc list of things found at the Hearne Generating Station.

The first one says they found scrap metal on top of a boiler. It should be cleaned up.

10 Q. Could a worker refuse to work because there was the existence of this scrap metal, he had reason to believe it was dangerous to his health?

A. If that worker perceived his health being in danger, yes.

Q. All right.

15 A. But as to the particulars in this list, it's speculation on my part as to what risk is associated..

Q. I understand, and I'm not really going through the list in the sense of trying to make a specific example of anything at the Hearne Generating Station. It's just that it's a very...there are numerous examples.

20 So if you go through this list, anything that's on this list, if the worker sees this and says there is a pile of garbage there in the corner, or a pile of...or some nails that are loose on the floor, or some door that is not properly bolted, and the existence of that may be injurious to my health...or he has reason to believe it may be injurious to his health...then
25 he has a right to stop work and call the inspector?

Or the right to stop work, which puts the rest of the process under the Act into effect?

A. Yes.

30 Q. Now, when the...so there's two options, essentially, for a worker who sees what is happening around him at the plant. One is, he can make a list, take it to the

5 Q. (cont'd.) occupational health and safety committee and go through that process, wait for...they can make recommendations, they can wait for a response, of if they have reasonable to believe it's dangerous, then they wouldn't go that route, they would go the other route?

A. Well, that may be, but I'm not sure that those are the only options open to the worker.

10 Q. What are the other options?

A. I would ask whether or not what is observed... and I take it that this is a worker in a workplace who is not inspecting on behalf of other workers, that it's his job in the area and he observes something that he does that's in his work area that he is responsible for, I would assume that if it's in his power as part of his normal work procedures, he would take corrective action himself, if he can do that.

15 Q. Yes.

A. And if he can't do that, that he talk to his supervisor to see that it gets done.

20 Q. Yes.

A. And if you have problems after that, then there are the types of mechanisms that you have described, and he can also call the Ministry of Labour and register a formal complaint.

25 Q. Yes.

A. And, I use the term formal advisedly - it's not as if his name is written down and...he complains to us and we try and inquire and make sure that things are handled properly.

30 Q. So in Dr. Uffen's example this morning about working on a machine where there is, let's say, dust coming out of it, that worker then has a number of options. He can report the dust to his foreman, supervisor, management, and ask that the matter be corrected; he can bring the matter up, he can

5 Q. (cont'd.) contact someone on the health and safety committee and have the matter brought up at that time; or if he has reason to believe it's dangerous to his health, he can stop work and ask that the matter...take the channels through the Act.

10 Those are the options that are available to an employee who perceives something to be something in a workplace that is hazardous to his health?

10 A. I will just say that what I said before holds.

Q. All right.

15 DR. DUPRE: I guess that would lead me to add to your list, Mr. Starkman, that he can phone in a complaint to the Ministry of Labour, and as I understand it from previous testimony, he can complain quite anonymously?

15 THE WITNESS: Correct.

DR. DUPRE: Is that correct, Mr. Gladstone?

THE WITNESS: Yes.

20 MR. STARKMAN: Q. If you received a phone-in complaint to the Ministry of Labour...and I'm assuming that the employee is free to go and use a telephone at any time...but if he could use a telephone and phoned in a complaint, what would the response time be? On a complaint like dust, someone phoned in and said my machine is very dusty today, it hasn't been this dusty for the last month, but today it's very, very dusty?

25 THE WITNESS: A. I would hope that it would be a reasonable response that would be given to the man, but I have no...never having been on the receiving end of a phone call and never having really inquired, other than perhaps into refusals of work timing, that I don't know.

30 Q. I'm sorry. There's no statistics in the ministry as to the response time on those types of calls?

A. On complaints?

Q. Well, on the type of call we were just referring to. If that's a complaint, yes.

A. On a complaint? I don't know. I would assume that if we get a complaint, for example in the construction industry, the manager or the administrator or the director will send out an inspector right away, because of the nature of the work, I think.

Q. I recall some evidence last week, when I think I asked a similar question, which seemed to indicate that the response time could be at least a couple of days. Not necessarily a couple of days, but it wouldn't be unusual for it to be more than a couple of days.

A. I have been present when all of the ministry people have given testimony, and such a statement does not ring true to me and I would be surprised if we did receive a complaint that was bona fide and it took two days to respond to it.

Q. So it is your impression, anyway, that you get same-day response?

A. I would hope.

Q. Well, I would hope so, too, but...

A. Could.

Q. ...would you get same-day response on a phone-in complaint? Is that your experience?

A. I'm sure that I can find many instances where we have given same-day response to a complaint.

DR. DUPRE: May I just ask, can one phone in outside of business hours?

THE WITNESS: Yes. Outside of business hours our phones are connected to an answering service, to an automatic tape recorder that gives a phone number that refers you to the central switchboard, which will get in touch with the particular

THE WITNESS: (cont'd.) duty people within the ministry, and after that we just take action.

5 DR. DUPRE: Is there a duty person available twenty-four hours a day?

THE WITNESS: Yes, there is.

DR. DUPRE: Seven days a week?

THE WITNESS: Yes.

10 MR. STARKMAN: Q. How many inspectors would there be?

THE WITNESS: A. Where?

Q. In the province?

A. Give or take some, around four hundred.

15 Q. And what would their breakdown be in terms of day shift, night shift and afternoon shift?

A. In terms of their responsibilities, it's a twenty-four hour shift.

20 Q. So when you say that somebody might...if somebody phoned in on a night shift and had this type of problem and they got in touch with them, it's like...they may have worked that day, but they are expected to go and respond to these types of complaints when asked to do so?

A. Yes.

Q. Are there any people who have specific assignments on night shift?

25 A. I don't know. I would say...

DR. DUPRE: May I ask...

THE WITNESS: Sorry. I would add, I recall...and this was maybe more hearsay, but in terms of tunnelling...we definitely go in on construction, tunnelling end of the business, during nighttime.

30 DR. UFFEN: Are these inspectors responsible for all kinds of accidents and industrial...?

THE WITNESS: Yes.

DR. UFFEN: You are referring...it could be
5 a tunnel accident or...?

THE WITNESS: If it was tunnelling, it would be
the construction branch that would send out their particular
people.

DR. UFFEN: Their inspectors?

THE WITNESS: Their inspectors, to deal with it.
10 Yes.

DR. DUPRE: I might ask, what steps does the
ministry take to disseminate the phone number?

THE WITNESS: It's on the back of the Act, but
that's not the phone number you are referring to, I don't think.

DR. DUPRE: The complaint number. I mean the
15 phone number that someone who wanted to...

THE WITNESS: Well, the Act has to be posted in
all the workplaces. The phone numbers are in there. We've also
made special provisions to post the names of inspectors, in the
workplace, with the local phone number both in mines and
20 industrial establishments, and they are stamped with the phone
number.

All our reports that are as a result of inspections,
that are required to be posted in the workplace, have to have the
phone number of the local office.

MR. STARKMAN: Q. Well, the reason I'm so
25 interested in the phone-in system is that it's our information, my
information that the response of the ministry, when they have a
phoned in, when people phone in complaints, is that they suggest
that the person phoning..they ask him whether he has exhausted
his avenues under the internal responsibility system, and if the
30 person says no, then they suggest that he proceed to do that
before the ministry is prepared to take any action...and I'm not

Q. (cont'd.) talking here about refusal...I'm talking about this...

A. Complaints?

Q. Complaints.

A. Right.

Q. And that the response is that they should exhaust their internal...their avenues under the internal responsibility system before the ministry will respond to that complaint.

A. I think that in cases that has happened, and I'm not sure...I do know that the ministry is examining its responsiveness to requests for service, and certainly it is certainly important to balance the direction of the work force, of our work force and its workload in terms of the various activities that we are responsible for, and I think it's fair to ask whether or not this person has asked his supervisor to fix it.

It's not throwing it back on the worker and leaving him in the lurch. That's not the intention. But I think it's fair to say that if it's a joint responsibility, that both parties have to be given a chance to fix it, and if both parties can't fix it, then we certainly have an obligation to respond.

Q. But is that as far as it goes? I mean, is it a request...when the question is asked, have you satisfied your avenues under the joint responsibility system, is just 'have you asked your supervisor to fix it', or doesn't that really mean have you gone the entire route of remedies that are available - in other words, reporting it to the health and safety committee, making recommendations, etc., etc., Which is the intention?

A. I don't know.

Q. So it could be the latter?

A. I would hope not.

5 Q. Well, does the ministry have any policies on what type of resort to the internal responsibility system a person must demonstrate before they will come?

10 A. I believe we filed as evidence the inspection, the industrial and construction branch, health and safety branch, policy guides, and I think...I don't know for sure, but I think such information would be contained in that document.

Q. You think that the answer is in that document?

A. I would expect so.

15 Q. Because dealing with the internal responsibility system, as I understand it the parties are to try to work the problem out within their own work environment. The ministry's basic philosophy, basic position is that the parties should work it out and the ministry will intervene only when the parties can't work it out.

Is that the tone of what the ministry feels about it? About the role in this?

20 A. No, I believe that the ministry also has an obligation in terms of the enforcement of the Statute and Regulations itself. That's why we visit workplaces when no one complains to us. That's why we visit workplaces where there are no refusals to work. That's why we visit workplaces when employers don't want us to be there, because we have an obligation to see that the Regulations and the Statute are being complied with, and within the resources that we have, this is what we do.

25 Q. So is the real reason that if someone phones up with a complaint and they say I have a complaint and the Act is not being followed, the answer might be well, you should report it to your supervisor and try to work it out there? Is that just because of a manpower shortage at the ministry? In
30 other words, if you had an unlimited number of inspectors, then

Q. (cont'd.) there would be a response to all of these complaints?

5 A. I'm not...this is a point of philosophy now, not of anything else...

Q. Yes.

10 A. ... not tied necessarily to the Act. It's whether or not it's fair and reasonable to have a worker pick up the phone and say, look, I found something wrong here, and come in and fix it for me, when he hasn't given the other side - who is held accountable by law to fix it, if he doesn't - the chance to do it. Maybe it can be fixed.

Q. So that's the philosophical premise, that the employer should be given a chance to fix it?

15 A. If it can be done immediately, without having to wait for an inspector to visit the plant, and it can be rectified, why should government, why should we be there?

20 Q. Yes, I understand that. I mean, it's my assumption that if a thing could be fixed immediately and it was that simple and the employer was willing to do it, you probably wouldn't get many phone calls like that.

But, we don't know. That's just my assumption.

I wanted to deal with section 24 of the Act, which is the reprisal, prohibition of employer reprisals for refusal to work.

25 I guess that the...my first question is, if someone feels that the employer has taken an action against him for a refusal to work under the Act, they have two remedies. One is through labour, through rates arbitration under an agreement if there is a collective agreement in force, and the other is to go the Labour Board.

30 Now, in the case where there is no collective bargaining relationship and no contract in force, is it the

5 Q. (cont'd.) individual's obligation to go to the Labour Board, or does the ministry take part in that decision to take the employer to labour? In other words, is it the employee who is making his case before the Labour Board, filing his application with the Board, or is the ministry who is playing that role?

A. Could you read subsection 24 (2), please?

10 Q. Of the Act? I understand that. It says...you are relying on where it says, or pointing out where it says "where a worker complains". Is that what you are referring to?

A. It says, "The worker may either have the matter dealt with by final and binding settlement of file a complaint with the Labour Relations Board".

15 Q. Yes. So I take it that what you are telling me is, it's the worker that takes the entire initiative in this? That the ministry doesn't play any role in the decision to do that?

20 A. Well, I think in the narrowest sense the Statute says that...gives the worker the right to carry his case forward.

Q. Yes.

25 A. Now, I'm not sure if there haven't been, and again it may be speculation, if in some circumstances we haven't helped a worker in taking the case, not carrying it for him, but perhaps assisting him in filling out a form. I don't know. It wouldn't surprise me if we did do that.

That would not be a statutory requirement.

Q. No, I understand that.

30 The reason I was raising it is that under the Labour Relations Act it says there that a worker may complain about intimidation in the formation of a union, to the Labour Board. Very often those complaints are brought by labour unions on

5 Q. (cont'd.) behalf of workers, and you know, the forms are set up to allow the complaint to be brought in that way.

10 I understand...what I was really asking is, you pointed out, is that the ministry's policy is that they have no statutory obligation to bring this, and that they may provide some advice or assistance, but certainly don't provide counsel, as I understand it?

A. That's correct.

15 Q. And do they have a firm policy on this, or is it just at the evolutionary stages, or...that's what I'm trying to determine?

20 A. I don't know. The Statute is really quite straightforward in this case. I think that trade unions, where there are trade unions, assist workers in carrying their case forward as well.

25 Q. Certainly. And I was referring specifically to the nonorganized workplace, whether the ministry saw itself in that role of positively assisting people, or whether they just might assist in a particular case, if I can put it that way?

A. It depends on the circumstances.

30 Q. Now, can we look at twenty-three...Section 23, sub 10, just right above it in the mimeographed pages?

35 This is: "When the inspector comes, the worker shall stay at a safe place near his work station during normal working hours, unless the employer assigns reasonable other work, or subject to subsection 24, where an assignment of reasonable alternative work is not practicable, gives other directions to the worker".

40 I guess...I don't know if there has been any decisions on this, but I mean is another direction to the worker

Q. (cont'd.) 'go home'? Is that what is contemplated by this type of...?

A. I would have to review all the cases that have happened and I can't tell you right now. It would be determined on a case-by-case basis.

Q. All right. The ministry has no policy on whether or not that is...

A. I wouldn't say that. I'm not aware of...I am not aware of the interpretation that may be placed on that particular section, that particular phrase in that response.

It does say, though, it's governed by subsection... governed by section 24, which deals with the prohibition of reprisals and discipline.

Q. Yes, I understand that.

I mean, there is a very fine line there, I guess. I was asking whether the ministry has ever considered those issues.

Now, there was some discussion previously about employers that used toxic or potentially-carcinogenic substances. Has the ministry ever considered a central registry of those employers, essentially requiring employers to register with them the fact that they are using these substances?

Instead of...because as I understood it, there has been some problem in identifying what employers are in fact using what substances. That has been a problem. It's a patent problem. But has the ministry ever considered requiring employers to register their use of these substances?

A. I don't think the Act requires that that be done.

Q. No.

A. And in terms of what should be done with regard to carcinogens...and I would distinguish between all toxic

A. (cont'd.) substances and carcinogens...they are not one and the same...

5 Q. I am content to stick with carcinogens.

A. Well, the ministry is working with the minister's advisory council on occupational health and occupational safety in terms of developing...looking at the need for a broader approach to the regulation or control of carcinogens, and this subject is under very active scrutiny right now, and whether or not the notion of a central registry for the use of carcinogens is going to be carried forward or not, I dare say, is up to the parties to bring before the advisory council and we will wait and see what the nature of the council's advice will be there.

10 Q. So as I understand your answer, it's something the ministry is, through its channels, considering?

15 A. It would be one way of dealing with the subject, yes.

Q. Are there any other ways that are being considered to deal with the subject?

A. Of what?

20 Q. Of the use of carcinogenic substances by employers....identifying which employers are using carcinogenic substances. Is there any other way that is being considered?

A. Through our normal...through the other activities that I described earlier today with Dr. Mustard, that apply to carcinogens as well as to other chemicals, or physical agents.

25 Q. I note that in the proposed asbestos regulation that construction sites are going to be excluded...that is, persons who work on construction sites, it is proposed that they not be included in the asbestos regulation, those sites not be included.

30 A. What's your question? You made a statement.

Q. Well, I was looking for an acknowledgement that yes, there is a proposal to exclude them from the regulation.

Has there been any consideration that the ministry as to ways to monitor the health of construction workers?

A. Yes, it's under very active consideration and I must say that it does not give me any pleasure not to be able to be able to say that this regulation is under active discussion with the parties and will be...that it has been in the Gazette and will be proclaimed soon.

We realize how important this particular subject is and we are doing our...I hope to say our utmost, to get a workable regulation that is fit for discussion and out within a matter of weeks. It's no...

Q. I have one other question. This morning you were talking about out-of-the-jurisdiction employers - for example, Johns-Manville. We have heard a lot of evidence as to their corporate structure, that decisions are made out of the country and out of this jurisdiction, and this morning there was some discussion as to the enforcement of the Act, and I was a little unclear as to when you are enforcing the Occupational Health and Safety Act, where the owner or employer of the enterprise is outside Ontario jurisdiction, does that present any particular problems?

A. I have no personal experience in that area.

Q. All right. Is it...the ministry, does it have any policy, for example, that while the actual owner may be outside the jurisdiction, that they will look to the...to someone in the jurisdiction to be held responsible for compliance with the Act? Is that the approach that is taken to it?

A. Well, I would assume that people in Ontario are held accountable by the laws of Ontario.

Q. Yes? But if you say that the employer has the

5 Q. (cont'd.) ultimate responsibility for ensuring that the Act is complied with, and the person who you turn to says, well, my position is assistant manager, but the manager lives in New York City, then do you just look as high as you can and put the full responsibility for compliance with the Act onto the highest-ranking person that is in the jurisdiction? Is that the approach that is taken to it?

10 A. I would have to defer to our counsel as to the approach taken. I would assume it would have to do with the whole issue of knowledge and responsibility, and I'm not a lawyer and wouldn't care to speculate.

Q. All right.

15 When you say on the question of knowledge that the employer must co-operate and provide information to the health and safety committee, does that mean that they must provide all information, or just information that is requested?

A. I don't understand.

20 Q. The type of situation I am asking about is if the health and safety committee requests certain information, I understand the employer, if they have that information and it concerns health and safety, must provide it?

A. I believe that's so, yes.

25 Q. But if the employer has information concerning health and safety, which the health and safety committee is not aware of and therefore does not request it, is there still an obligation on the employer to provide that information, which is in their possession, to the health and safety committee?

A. I don't believe so, but I'm not...I don't believe so.

30 Q. Well, is that how you would read the Act, that's what I'm really asking?

A. What section?

5 Q. Well, I'm not referring to any specific section at the present, but is there an obligation on the employer to provide health and safety information to the committee, which is not requested?

A. Well, I don't know.

10 Q. Okay. See, the way I... my understanding... well, I understand they are to co-operate and provide information, but I don't know whether it extends to providing information that is not requested.

I guess...has the ministry ever had reason to deal with that type of issue?

15 A. I haven't. There may be cases that occurred that I'm not aware of.

Q. Who would handle it? Would that be the director of occupational health and safety?

A. It could start with the local inspector and work all the way up.

20 MR. STARKMAN: Those are my questions.

DR. DUPRE: Thank you, Mr. Starkman.

Next?

MR. McCOMBIE: Okay. I just have several very specific questions and then a couple of general ones.

CROSS-EXAMINATION BY MR. McCOMBIE

25 Q. The first specific one is to refer to one of the, I guess tab five of the compendium, which was the presentation made by the ministry to the Commission in March of 1981, is that correct?

I just note on page...

A. The supplementary brief?

30 Q. I'm not sure what the title is here. Yes, the supplementary brief. That's correct.

5 Q. (cont'd.) And on page five and six of that, there is a discussion of a survey that was being done at the Bendix Company in Windsor, and as this was just over a year ago I was wondering if there have been any new developments on that that you could tell us about, or how that study is proceeding?

A. I'm not aware of the current status of that project. But if the Commission would like an update, I can obtain that.

10 Q. Would you have any idea of what the projected timeframe for this study was, at the time that it was set up?

A. No.

Q. Just to give us an idea of how long studies such as this might be expected to take?

15 A. No. I haven't...Mr. McCombie, I haven't looked into this particular project recently, and as I say, I will report to the Commission on its current status.

20 Q. Okay. I would like to ask a couple of questions again about the...and I discussed this to some extent with, I believe it was Mr. Melinyshyn, about the role of prosecutions under the Act.

I am wondering if...first of all, I should check to see whether you feel competent to deal with this - just the philosophy of prosecutions. Have you been involved with the policy on prosecutions?

25 A. I have read it, yes.

Q. Were you involved with the formulating of the policy?

A. No. It was there when I came.

Q. Well, the policy that we received the other day is dated February, 1982.

30 A. That was a revised edition.

Q. A revised edition, but you weren't involved in

Q. (cont'd.) the revision at all?

A. No.

5 Q. Well, again, let me maybe just put the question to you and see what your response is.

It strikes me...and I asked Mr. Melinyshyn this, whether he felt that there was any difference between the Occupational Health and Safety Act as a piece of legislation that has various duties and obligations and various enforcement

10 powers, and any other piece of legislation.

I believe he answered that he didn't see any difference.

Do you feel the same way? I mean, do you see the Occupational Health and Safety Act in similar light as any other piece of legislation?

15 A. Yes.

Q. The question I then put to him was, it was my feeling from my own minor brushes with things like the Highway Traffic Act, I certainly perceived a difference, and I put this to you: If I am found to be speeding, I generally don't get a directive from the police officer to tell me not to do that

20 again. And I'm just...I guess what I'm trying to get across is that it strikes me that when there is violations under this piece of legislation, the prosecution route is seen here as the last resort, and there certainly seems to be an awful lot of other pieces of legislation where it is not a last resort at all.

25 I'm just wondering how you can account for the difference in this.

A. Well, I think that Ontario has, if you examine the record of prosecutions in other provinces across the country in this field, I think that Ontario has taken many, many more people to court over infractions involving the field of

30 occupational health and safety than other provinces. I think

A. (cont'd.) that all that I'm trying to draw from that is that we are certainly not loathe to prosecute.

5 I also believe that for a certain infraction under the Act we have officers appointed, I think under the Statutory Offences Act, Mr. Lederer, is that the name of the Act?

MR. LEDERER: Provincial Offences Act, I think is what you are talking about.

10 THE WITNESS: Yes, that's right, that's right. And for certain infractions they leave tickets, just like you have indicated. Rather than getting caught speeding, they got caught doing something else, and they are fined immediately, on the site.

15 That just depends upon the nature of the offence. In other cases, and once again I would indicate that not being a lawyer it seems to me that the law says that only the courts can lay down charges and convict people and levy fines, so we don't have, for all types of offences we don't have the same authority as a police officer in that sense, or maybe...and I would also say that...well, that's all I will say.

20 MR. McCOMBIE: Q. Okay. Well, you know, I don't want to belabour the point, and believe me, I'm not in any way trying to be facetious, but certainly when I talk to workers they perceive a real difference between this piece of legislation and other pieces of legislation that impact directly on them - such as things like the Highway Traffic Act or other

25 legislation.

I mean, I just note...I have a copy here, for example, of Hansard, from June 22nd of this year, in which the minister gives the statistics that in the year 1980/81, eleven hundred orders were issued. And in the same period of time,

30 two hundred and thirty-four cases were prosecuted. It just strikes me that that's approximately one out of five prosecutions,

5 Q. (cont'd.) as opposed to orders, and I mean, workers that I have talked to get the impression that they never get let off with a warning - or very rarely - when they break the law in some way, and yet here is a law that they see being broken and all that happens are the directives or orders are issued. They find...and I myself, I can't answer that.

10 A. I don't understand what the figures are that you have just quoted, but if you say that they are correct, I will take it...

Q. Well, it's from Hansard. I can't vouch for the accuracy of them.

A. Well, I guess that there would be two points that I would make.

15 The first is that when we carry a case to court, very frequently when the employer is convicted the workers are... the case is withdrawn against the workers.

20 The corollary to the point that you are advancing to me is that if you assume that there is a joint responsibility, that when you carry a case against...in future, if we accept your position, if we carry a case for an infraction for a machine guarding against the employer, the worker should also bear some responsibility for that, too?

25 Q. I'm not making a suggestion. I was just putting across to you what I have heard, and the difference in the laws.

Let me just ask one further question on this, and then I'll leave it along.

30 To the best of your knowledge, has the Ministry of Labour, in any infractions...let's say in any glaring or blatant infractions under the Health and Safety Act ever considered other court remedies? In particular what I'm thinking of is, have they ever considered the use of the Criminal Code against

Q. (cont'd.) a particular party?

A. I don't know.

5 Q. Okay. I would just briefly like to touch on the discussion that arose this morning, and again without getting into a big debate about the legal ramifications of this, I just want to, for my own satisfaction, get clear exactly what the problem with some of the internal documents at the ministry is, and I just want to understand whether this is, the hesitations
10 that have been expressed have been because of the fact that there are individual names on those, or whether there's other problems, other problems of confidentiality?

MR. LEDERER: I'm sorry, before Mr. Gladstone responds to that, I think perhaps I ought to make a point, since
15 I'm the one who raised it.

The point that I made this morning was, and it seems self-evident, we can't really know what the problems are, if in fact there are any. We don't know what documents are being referred to insofar as the comments this morning are concerned, in the sense that we haven't been able to look at them.

20 Mr. Gladstone raised a separate concern of his own, which was a specific one which Mr. McCombie refers to, Mr. Chairman, you made a ruling with respect to that.

So far as anything else is concerned, how could we possibly know without looking at the documents?

25 MR. MCCOMBIE: I guess I just wanted clarification of the client/solicitor relationship, and I just want it clear in my own mind whether in this case the client would be either a worker or an employer writing to the ministry for an interpretation. Does that constitute, to the legal department, would that constitute a client/solicitor relationship?

30 MR. LEDERER: So far as I am aware at this moment, without...I'm sorry, may I respond to that?

DR. DUPRE: Yes.

5 MR. LEDERER: So far as I am aware..and I haven't got a particular document in front of me...it would be very difficult to know, entirely in the abstract, what the nature of any particular relationship is without knowing the specifics.

10 But basically, I believe, when the ministry refers here to a solicitor/client relationship, it is an employee within the ministry requesting a legal opinion from the legal director or another member of the legal branch.

DR. DUPRE: Right.

MR. LEDERER: In that instance, it is the relationship between the legal department and another employee of the ministry, and that is the one to which we are now referring.

15 Now, whether there is some obtuse case that I can't come up with now...

MR. McCOMBIE: That's fine. That clarifies it for me. I just wanted to...

20 MR. McCOMBIE: Q. One other subject that was raised this morning, and I believe it was Dr. Mustard who was asking you questions about this, was the role of education.

THE WITNESS: A. Yes.

25 Q. I believe there were five different areas that were enumerated...and you can correct me if I'm wrong...but my memory was that they were the safety associations through the WCB, the ministry's own advertising, the labour education programs that have been carried on, general stories in the media, and any employer education on the job.

Is that a fair representation?

30 A. Yes. I guess the ministry has put out a little more than just advertising in terms of...

Q. Okay. Well, ministry publications and pamphlets.

5 A. Publications. And I don't know if the resource centers that have been established in the universities of McMaster...sorry, not McMaster...Waterloo, University of Western and at Lakehead University would also play a role in the provision of information and education.

I know they do.

10 Q. Well, one thing that struck me somewhat by its absence, and perhaps this is just something that it is so obvious it was overlooked, but I'm just wondering if the role of the inspector, in doing education, and particularly in a small...

15 A. Well, yes. Sorry. I agree. The ministry inspectors and other people engage in extensive public speaking, and when the Act was brought in we spent countless visits trying... not trying, but meeting with management and labour and drawing to their attention the fact that this Act is now in place and what is required. Yes.

Q. I would mean more in their day-to-day functioning.

A. Yes, it has an educational role.

20 Q. So that they would see virtually every inspection as having, to some extent, an educational component to it? I mean, obviously if there are questions asked, they would be in a position to respond.

A. Yes.

25 Q. But would they be...I mean, what I'm trying to get at is, would part of the inspector's mandate be to ensure that to the best of his or her knowledge the work force and the employer were as well educated as possible as to the Act itself? Or would they see that as the responsibility of the employer and the employees to be familiar with the provisions of the Act and/or any regulations?

30 A. You would expect that during the course of

5 A. (cont'd.) the inspection that they would see whether the Act was posted, that the people had some sense of the Act. Yes. And during the course of the inspection, deal with the particular provisions of the regulations that they found to be in violation of the requirements...the workplace to be.

10 Q. I guess what concerns me is, let's assume that there is an inspection and there is nothing on the surface that either the employees complain about or the inspector notices. For example, I gather that one of the functions of the inspector is to discuss with the workers there whether or not there are any perceived problems in the workplace?

A. Yes.

15 Q. Now, surely, the answer to that question would vary depending on the degree of education, practical education of that worker - whether or not there were aware of what may or may not be required under the Act and Regulation. I am wondering whether the inspector would see that he or she would have any responsibility to make sure that that is an educated response to their question?

20 A. I would assume that the worker representative that meets with the inspector would be one that, for example, is a member of the health and safety committee and would have some particular interest or knowledge in the field.

25 It's a valid question and I can't give you a very complete answer, I'm sorry.

30 Q. Let's deal for a moment with...I guess we have focussed to some extent on unorgnized places as our perception at, I believe, this table and certainly a lot of other places, is that the Act is more likely to work better in a place that has a union, and particularly a strong union with an educational program, so we have focussed to some extent on unorganized places.

Let's take that one step further and deal with an

Q. (cont'd.) unorganized shop where there are less than twenty employees, where there is no mandatory committee.

5 Again, I mean, what would the inspector's role in something like that be, where he would not have the immediate contact with a worker representative from the committee?

A. He would still have to have a worker accompany him through the workplace. I would imagine he would still have to discuss matters with the representative of the worker when he meets either before or after, or both, as I believe the procedure was outlined to you when Mr. Melinyshyn was here.

10 Q. One of the questions that I asked Mr. Melinyshyn, and perhaps I can ask you to put it whether you agree with his response or not, was whether or not there was a different approach that an inspector would take in what I called a highly-organized workplace, and one such as I have just described? I mean, would they see their role perhaps as being more of a policeman's role in a small, unorganized workplace, and more as an arbitrator, a mediator, in the other situation, in the highly-organized place?

15 A. In a highly-organized place where they find an infraction of the law, they don't mediate, they leave orders.

20 Q. Okay. But leaving aside for the moment an infraction of the law. Where they...I think a lot of evidence has come out that where there is a problem, the ministry likes to...or the inspector would see themselves in the role as mediating between the two parties and helping them come to a satisfactory conclusion.

25 Is that not correct?

A. It depends on the circumstances. Where there is an...

30 Q. Would it be true in some circumstances? Where there isn't an immediate problem or an obvious infraction of the law?

A. So what's to mediate? If there isn't a problem and there isn't an infraction?

5 Q. Well, there is a problem, and what is the ministry's role then?

As I understand it from the testimony of previous ministry witnesses...and there was a diagram which was up on the board which was a triangle which had labour, management and government, and government was up on the top and we discussed this with Mr. Melinyshyn, and he seemed to be suggesting that the government's role at the apex of this pyramid would be... perhaps move relative to the perceived power structure in the workplace.

Now, is that not your...is that different from your understanding?

15 A. I believe that what he was saying is that within the workplace he was, I think, indicating that government has a role to play with management and labour, and it can't leave management and labour alone to deal with health and safety because just right now the system couldn't work that way, in our opinion, and the law obviously says that we have responsibilities to work with management and labour to see that the workplace is safe, as defined by the requirements of the Act and reasonable practice...and the fact that people aren't getting hurt.

20 Q. But you are not necessarily saying that there is...the role, whatever it may be, of the government, is uniform across the whole spectrum of workplaces?

A. We, as...

Q. It would vary from place to place, I would assume?

30 A. Well, I would say that if we came into a company and found that there were particular problems with the joint health and safety committee, and our service, consultant

A. (cont'd.) services could provide assistance, we would get those people in.

5 If we are in a smaller place and it is perceived that their punchpress guarding is abysmal, not only would we...

Q. How would that be perceived?

10 A. Just let me finish...and not only would we take corrective action, but if people there aren't aware of how to guard punchpresses, there are excellent places that can train you to do that, and we would put the company in touch with the appropriate people so that they received the training.

15 Q. Okay. How would that inspector be aware...and this gets, again, around to the role of the inspector? Would the inspector be required to look at all aspects of the operation that he was inspecting, or would he only be required to look at the aspects that were in operation at that time?

I mean, does he look at the whole workplace as a whole and any potential problems that might arise, or just at what may be there at the time of the visit?

20 A. I would assume that he certainly looks at everything that is in operation when he is there.

Q. That he looks at everything that is in operation? So if a particular machine weren't operating...

A. Well, it depends on...

25 MR. LEDERER: Just a minute. Mr. Chairman, I am having some difficulty with this, and it may be that I don't understand where it's all going, and that may be my particular problem. But that's the second time in the last few minutes that Mr. McCombie hasn't let Mr. Gladstone finish, and with respect, I would appreciate it if you would at least give him the opportunity to complete the answer that he is attempting to give.

30 Beyond all of that, as I listen to this and if Mr. Gladstone is prepared to answer, I certainly don't object to

5 MR. LEDERER: (cont'd.) that, but I must confess that as I listen to this line of questioning I'm really wondering whether it isn't something that belonged in the area of questions that were asked of Mr. Melinyshyn.

10 Mr. Gladstone is a policy advisor who can tell you about the Act and explain to you how he perceives the Act was meant to work, and its relationship to the Ham Commission, which seems to be the foundation for a lot of the present law, but to ask him about the acts of particular inspectors in particular situations may well be, and it's really up to Mr. Gladstone to say, may well be a little unfair.

15 MR. MCCOMBIE: Can I just briefly respond?

20 I should explain that it seems to me that we are looking at how the Act operates, and this is obviously part of the mandate of the Commission, and I'm just looking at it from a policy point of view rather than the day-to-day operations.

25 I mean, we are very much in the dark as to, in a lot of ways, how the policy of the ministry is vis a vis inspections, and what the role of the inspector is, and quite frankly I'm still not exactly clear of the inspector's powers and duties, and whether or not...you know, how that is perceived under the philosophy of the Act, and exactly what the role of the government is in this power structure.

30 These are the reasons I am asking these questions, and I haven't...I have a case in point of a particular instance that I'm concerned about, as to how these things operate, and it's my concern...and particularly with the unorganized workplaces... as to the power structure and how the ministry sees the inspectorate working in those situations.

35 DR. DUPRE: I just want to say, Mr. Lederer, that I'm glad that Mr. McCombie just spoke the words that he did, because I frankly have had a bit of a hard time following where

DR. DUPRE: (cont'd.) you have been trying to go with these questions to Mr. Gladstone.

5 I take it that your particular interest in the questions have to do with the extent to which ministry policy is sensitive to inspections and so on, in the unorganized workplace, is that correct?

MR. McCOMBIE: Yes.

10 DR. DUPRE: That's the line we have been following. Okay. Well, of course, that is of interest to the Commission, and could I just perhaps ask that we keep our eye on that ball, and also give Mr. Gladstone a chance to finish his answers.

Now, where are we?

15 MR. McCOMBIE: Q. Okay, what I was trying to get... I mean, maybe I should cite a certain example, which is a small, unorganized workplace, which is less than twenty people, so no mandatory committee, and a young work force where this isn't perhaps the knowledge that there would be through media, and whatever, of the law.

20 In this particular instance it struck me that the inspector was taking an extremely neutral role, and saw himself as having no educational function with either management or the workers, and this particular example, there happened to be a death, and the supervisor was a twenty-one year old woman who had no knowledge of the Act, the machine that caused the death
25 had not been operational the week before when the inspector had visited.

This is one of the things I want to ask is, is that the kind of policy that only those machines that are in operation, for example at the time of a visit, are inspected?

30 THE WITNESS: A. In this case, that machine was not inspected when the inspector was in the workplace, because

A. (cont'd.) it was not in operation?

Q. That's correct.

5 A. I'm not sure that we would necessarily condone that practice, and I think that as a result of that particular case we are in the process of re-examining how and what type of activity should take place in the course of the inspection.

10 Q. And with regard to the responsibility of the employer to have a competent person as a supervisor. There is evidence given in this particular case...and I don't want to make it a particular...you know, I don't want to give it a name because I think it's more the policy that flows out of it that's important...in this particular case the supervisor had no knowledge of the Act or her responsibility under that Act, and the evidence of the inspector was - that's the employer's
15 responsibility and it wasn't my responsibility to ensure that this person had knowledge of the Act.

Has that changed in any way?

20 A. I'm not sure that that's the case or not, and I'm also not sure whether or not this case is before the courts or not.

Are you aware of that?

Q. Again, as I say, I don't want to deal with the specifics of the case itself. I just want to use it by way of an example.

25 DR. DUPRE: By way of a hypothetical example?

MR. McCOMBIE: Yes, using the facts in a hypothetical...

30 MR. LEDERER: It may be unnecessary for me to say this with that comment, but one of the things that has been bothering me is that what we are dealing with here is Mr. McCombie's understanding of what people said and did, and so long as that's...

5 DR. DUPRE: Oh, I think so, but I'm going to tell you, I've been all ears simply because at one point Mr. McCombie simply said that I'm just going to keep this as a hypothetical example.

Somebody got killed there, right?

MR. MCCOMBIE: Yes.

10 DR. DUPRE: And , see, I've just been looking at section 25 of the Act, which of course on the face triggers a number of things:

15 "Where a person is killed or critically injured from any cause"..etc., etc., ..."the employer shall notify the inspectorate and the committee, trade union, if any, immediately, by telephone, telegram or other direct means, and the employer shall, within forty-eight hours"...etc., etc., again there are provisions to preserve any records and so on.

20 Now, I guess the point that I, of course, have an interest in is simply this - it happens in any kind of real-world situation that what is in the legislation may not be observed in a particular case, and I would take it very much that the Act quite literally transforms the legal environment in which a workplace finds itself when somebody has been killed, in terms of creating some immediate obligations and then bang, bang, bang, at least by law, things are supposed to happen.

25 And your point at this juncture is there could be hypothetical examples where these things do not happen?

MR. MCCOMBIE: I think my point is more that it would be good to prevent them from happening.

DR. DUPRE: Oh, yes.

30 MR. MCCOMBIE: Certainly any number of things would happen once a death occurs. My point is to prevent the death in the first place.

THE WITNESS: I agree with that.

5 MR. McCOMBIE: Q. Let me just ask one final question in all this, and I won't even make it a hypothetical case, but...the ministry policy, is it such that the inspector feels any obligation to ensure that the employer or the supervisor are familiar with the details of the Act, and their rights and obligations under the Act?

10 THE WITNESS: A. One would assume that, but perhaps that would be a question that you would have put to Mr. Melinyshyn or Mr. McNair.

15 I would assume that employers and supervisors are supposed to know the Act and to try and see that that's done. In the course of our work we make...it's surprising when you walk into a garage, sometimes you see extracts from the Occupational Health and Safety Act posted in small workplaces.

20 It does happen that the information gets down to the smaller employer, and I guess one way in which our inspectors do get the information across, not only by these types of small handouts, is through the, I guess, from time to time, the involvement of the safety associations.

25 Q. Okay. I just have one further line of questioning I would just briefly like to touch on, and that's section 14 of the Occupational Health and Safety Act, which is the duties of the employer.

30 Taken at face value, reading through these, they do seem to be quite extensive and fairly broad, and I'm wondering if you are aware of any concern that has been raised within the ministry about this particular section and the interpretation it was given in the recent court case in Windsor, over the asbestos and the school board, in which charges were laid under this section, and dismissed due to the fact that there had not been a regulation

Q. (cont'd.) on asbestos?

5 A. I think that Mr. Melinyshyn answered that question and I have nothing further to add to his statement about the reasons for the dismissal of the case, and it has really nothing directly to do with a particular weakness in this Statute itself. The Statute is not wanting.

MR. McCOMBIE: Okay, thank you.

I have no further questions.

10 DR. DUPRE: Miss Jolley?

CROSS-EXAMINATION BY MISS JOLLEY

15 Q. I would like to talk about the internal responsibility system, and I think one of the major problems with the internal responsibility system is that I don't know that anybody quite understands what it is that is meant by the internal responsibility system, because...and I think that the example was a perfect one, from the Hearne Generating Station, where we had on the one hand Mr. Wilson presenting his viewpoint of the internal responsibility system, which didn't appear to include workers in his definition - and I'm sorry, I seem to have lost it, so I can't read his definition - but I think you were here to...

A. I don't recall his definition.

Q. Oh, I'm sorry.

A. I missed the opening part of his testimony.

25 Q. Right. It struck me that it was...pardon me?

UNIDENTIFIED SPEAKER: Mr. Girdouskas quoted it.

MISS JOLLEY: I quoted it to Girdouskas, but I'm afraid that I lost the document after.

30 Q. In any event, I think, nevertheless, it seems to me that there are all kinds of interpretations out there, and the other thing is, you gave an interpretation...

A. And.

Q. And?

A. And.

Q. And as well as that, we have the internal responsibility system cyclical review interpretation where the philosophy has been presented in your Operations Manual.

I'm just wondering whether it wouldn't make sense for the ministry to perhaps make a clearer statement about exactly what it is, because we have had a number of interpretations given from even various and sundry people in your ministry.

For instance, Mr. Cliff Baskin, the other day, spoke about tripartism, and on the other hand Mr. Melinyshyn didn't.

A. And to what effect? I have no idea what he said, and I can't draw anything from that statement.

Q. Well, he said that the labour, management and government were three partners in health and safety, working together. And on the other hand, the Operations Manual suggested employers and employees have the primary responsibility for occupational health and safety, and that ultimately the system should go...move from enforced compliance, through self compliance to ethical compliance. Presumably that movement is taking it further away...I guess what I'm seeing, and I think what's confusing to the labour movement, and I'm wondering whether it wouldn't be helpful if the ministry might put forth a clear statement exactly how the whole internal responsibility system is supposed to work, in fairly simplified form, for all of us to understand - just as a philosophical statement of what you mean by it.

MR. LEDERER: Mr. Chairman, I'm not sure...there's a couple of things, if I may, there's a couple of things about the question that bother me.

Firstly, we have had reference to a statement by

5 MR. LEDERER: (cont'd.) Mr. Baskin, about which I presume Mr. Gladstone knows nothing. We haven't even had a statement as to where the comment was made, and it's a difficulty that I've had throughout, that we continue to have references to other statements or other occurrences in other places without...

10 DR. DUPRE: I know this happens from time to time, Mr. Lederer, but let me see if I follow something. You refer to the definition that Mr. Wilson gave of the internal responsibility system?

MISS JOLLEY: Right. I have it.

DR. DUPRE: You have it?

MISS JOLLEY: I have it here.

15 DR. DUPRE: And I gather that one of the points that you were simply trying to ask a question about, from a policy advisor, is to what extent may there be a problem because there are different kinds of definitions of the IRS running around out there.

Okay, why don't you give a definition and we'll see if he runs it up the flagpole?

20 MISS JOLLEY: Okay.

MISS JOLLEY: Q. Mr. Wilson suggested that the internal responsibility system in health and safety is doing that which is required in health and safety from a social and human standpoint, voluntarily. And that was his definition of the internal responsibility system.

25 Now, Mr. Wilson also sits on the advisory council to the minister, and presumably has been participating in discussions about that, and it strikes me that that is not exactly what you described this morning, or what your Operations Manual. And I think not only are we confused, in labour, but I think that management appears to be slightly confused as to what
30 it all means.

5 Q. (cont'd.) I guess what I'm saying, do you think
it might be helpful if the ministry perhaps clarified exactly
what it all...what the internal responsibility system is, and
most specifically, when you have a policy that suggests that we
should move from enforced compliance, through self-compliance to
ethical compliance, I wonder where we are right now. Are we
at enforced compliance or are we now self-compliance, or...all
10 these words, we are not sure what they mean, and I think that
both sides of the internal responsibility system are confused.

THE WITNESS: A. I'm sorry you are confused.
I think that...

Q. I think even the Commissioners were confused
this morning, to be fair.

15 A. I think that that phrase was coined simply
to...as a shorthand to describe the relationships within a
corporate or company structure.

I believe that in response to one of the questions
on the order paper, there has been a very short definition of
what we mean by the internal responsibility system, and if I'm
20 not mistaken...and I very well may be...the basic intent of
responsibilities of the parties are set out in the early part
of our very short guide to the Occupational Health and Safety
Act, but we'll certainly consider putting out something that
would assist the parties if they think it would be useful.
Yes. There is nothing to stop us from doing that. I take that
25 as notice.

Q. You suggested that the committee, the joint
health and safety committee, or the actual process of the
internal responsibility system today was check the effectiveness
of the...sorry, do you want to...right.

30 A. In terms of your second question, I can tell
you that I never had anything to do with that particular

5 A. (cont'd.) construct that you have described about the status of companies in terms of compliance with things, but it would appear to me that there are many thousands of companies in the province and some of them meet the requirements of the law and go well beyond that, without having to have us tell them to do it.

10 There are other companies that just do what is required by the law, perhaps, and no more, no less. They do it themselves, and again, they do it because we don't tell them to do it, and there are some companies that do only what we tell them to do, and we have to keep after them.

15 I guess that's the kind of...these are the types of things that are being described in that hierarchy of levels of compliance. I would take it, perhaps, with a grain of salt.

Q. It was, to be fair, given to the Ontario Federation of Labour to distribute, to describe to our members what the internal responsibility system was and what our role in terms of the inspectors were, so I think that...

20 A. When was that given to you?

Q. That was given to us by Mr. McNair about two years ago...two years ago, and asked for our co-operation.

A. Since you were obviously confused by the information, did you seek clarification?

25 Q. On any number of occasions, and we kept getting different interpretations.

A. From whom did you seek clarification?

Q. From Mr. McNair, on a number of occasions, from Mr. Hess on occasions, from Mr. Baskin on occasions.

A. I see. So you never took it to the next level in the organization?

30 Q. Well, I'm not sure that we should have a debate here, but...

5 A. But it's important for me to know that if we put out something that you have obviously...I don't know, used or not used, but were not satisfied...

Q. We distributed widely.

10 A. with, and distributed it, and then come back to us two years later and say, look, we don't understand, can you help us out, can you do something. And you have something that we've done that you don't understand, and you haven't taken it up with us at a higher level, at an official level...

15 Q. Oh, I think to be fair, Arthur, we have had any number of meetings, even with the minister, and where the discussion of the internal responsibility system and confusions have been raised, and I don't think we should go into this any further.

I mean, you've been at meetings where we have discussed this with the minister.

20 A. I'm not referring to meetings. I am referring to that particular document, and it's that document that caused you trouble.

Q. No, that document hasn't.

A. Oh, it hasn't!

Q. It's just the discussion of the internal responsibility system by every single person in the ministry seems to be different.

25 A. But you've just indicated to me that that document is the basis of the confusion, and if it is the basis, we want to fix it.

I'm willing to meet with you at any time, to fix it.

Q. Sounds like Michael Starr.

30 MR. LASKIN: It's an offer you can't refuse.

MISS JOLLEY: Anyway, may I go on?

DR. DUPRE: If you please.

MR. LEDERER: That's one recommendation you won't have to make, anyway.

MISS JOLLEY: Q. I would like to talk about...you mentioned the role of the committee is in fact to check the effectiveness of the implementation of the Act and the Regulations, etc.

THE WITNESS: A. Yes.

Q. In the Act, it is required that the employer post your directives, etc., your orders, directives, reports, etc., and would it not make sense, perhaps, to give information directly to the health and safety committee in order that they can see that information? I mean, we are assuming...and here again I am trying to deal with the unorganized workplace and the employer that is not necessarily adhering to the law, and the fact that the employees don't know that such a report exists, they don't ask for it.

Would the ministry think that it might be a consideration to change that part of the Act so that the information goes directly to the employees on the health and safety committee, or directly to the committee members?

A. I would take that question under advisement.

Q. Do you think that might...?

A. I don't know. I can't tell what's going to happen when such a matter comes before the legislature.

DR. DUPRE: Just let me see if I understand the thrust here.

Your question suggests that the Act may be in need of amendment so as to ensure that what goes exactly, goes directly to employees? That what go?

MISS JOLLEY: I'm sorry. That all the ministry documents go directly to the health and safety committee.

DR. DUPRE: Go directly to the health and safety committee.

5 MISS JOLLEY: Members of the health and safety committee, so that this role of seeing that they are carried out in the workplace might be possible, and similarly, the discussion of the employer having to consult with the joint health and safety committee about all things about health and safety is a suggestion we might also make, because a situation occurs on a number of occasions where new chemicals enter the workplace and that the health and safety committee only deals with them after they have entered and after there have been complaints, and I mean, there are different approaches to that. Sweden has, you know, the workers have a right to participate in new plans, etc., but I'm suggesting that that whole role of forcing the employer into a more consulting basis, as opposed to just co-operating with requests, might also help to balance things a little.

15 THE WITNESS: The first thing I would say is that if you have these kinds of concerns, that you make a presentation to the ministry to see that the Act is amended, and establish a position with us on that.

20 The second thing is, you know that the advisory council have a committee on the implementation of the Occupational Health and Safety Act, and the problems, and I suggest that you play an active role. I know the Federation is, and I know the ministry is, interested in hearing from the people about what has to be done to improve the Act, if that's necessary, and would be more than willing to sit down and consider what has to be done.

25 But I can't agree or disagree with anything you have put forward. If you would like to make independent and separate representations to the Commission on this, that's also

30

A. (cont'd.) your privilege, but I can't speak to that.

5 Q. Can I just take you on a philosophical discussion for a short period time, because I know that you have read Carolyn Tooey and Michael Trebilko's study as well.

10 Do you see...and I may be misinterpreting this... but when you set standards, or designated substance standards, as you have with lead, and you require the employer to consult with the health and safety committee over both the assessment, and especially over the control program, do you see in fact what is going on in a health and safety committee as bargaining over health and safety, in a sense?

15 A. I would say that it depends upon the climate of the organization as to whether that consultation takes place in a milieu that can be called bargaining, or whether it is likened to problem solving.

20 Q. If, however, a ministry sets a standard which by its own admission does not protect all of the workers' health, and the health and safety committee is asked to consult over that, is it not possible that they could bargain, in fact, lower TWAEL's different control mechanisms such as the elimination of the product from the workplace, etc.?

25 A. I think that the Occupational Health and Safety Act sets minimum requirements in the sense of, to use an example, the speed limit is a sort of the maximum, you can drive below it. The Occupational Health and Safety Act sets out some common features that have to exist, and employers and employees, if they so wish, can have something that is far superior to that, if they require, if they believe that that's necessary.

30 But the process that led to the establishment of the law requires only certain things to be done.

Q. I just wanted your opinion on that.

I'm concerned about the legal interpretation of the term physician, and it was released, I guess, last Monday, during Dr. Pelmear's...have you read the interpretation now, on physician?

A. I read it when...before we brought it to the Commission.

Q. Right. I guess I'm concerned because it was... we had heard a rumour that this was the interpretation, that's why I just asked the question. But I would like to read to you the interpretation of physician by the Ministry of Labour, in the report of the designation of lead in Ontario, and this is the background document to the Lead Standard, and on page eighty-seven and eighty-eight, the definition of the term physician is the title.

They are discussing the fact that:

"The Canadian Battery Manufacturers Association thought that the Regulation should make clear that the physician means company physician. In contrast, the OFL brief contained the suggestion that the joint health and safety committee select their physician."

The response was: "The term, quote, physician, however, was not changed to read company physician, because many small companies do not have their own physician and may share a physician with any other company, and furthermore, the examining physician could well be the worker's family physician".

We are a little concerned about this, because that was our understanding of the term physician, and as well as that Dr. Pelmear, at the open meeting on lead, was asked, in fact, by Canada Metals to clarify that once more, and he suggested again

5 Q. (cont'd.) that the joint health and safety committees should have the right to select what physician, and I'm quite concerned about the interpretation of physician and I wonder if you can clarify exactly what...is there going to be some further discussion of this, or...?

10 A. Right now I can only tell you what I understand, and that's the Lead Regulation, for example, requires where a control program has to be established, that an examining physician be appointed under the control program, to carry out the duties are required under the code of medical surveillance.

15 That in the development of that code, the control program, you have to consult with the joint health and safety committee, that therefore there is discussion between management and labour over who the examining physician is.

20 There is provision within the Regulation that if there is a dispute over the two, management and labour, and a company says no, it's only our guy, and the labour force says that he's certainly not acceptable to us, that's a matter of dispute and we have a mechanism in the Regulation to mediate that dispute.

Q. But then your interpretation by Mr. Hess would surely be used in the resolution of that dispute?

25 A. I can't say, right now. Until the dispute arises over this, it may be that there is another way of getting around the distrust of the company physician in a particular plant. I don't know.

30 Q. May I ask you about the asbestos regulation, the proposed regulation, and could you explain to us why the ministry did not accept Dr. Finkelstein's recommendation to treat all asbestos fibers the same, and to place a standard at zero point five fibers per cubic centimeter?

A. I believe that in our background report on the

5 A. (cont'd.) designation of asbestos that that matter was dealt with, and if I'm not mistaken...and I haven't read it in a while...the position that the ministry took was that Dr. Finkelstein's report was too new, hadn't been subject to peer review yet, it was a matter that had been...his work had also been provided to this particular Commission for review, as well as outside people, and it just was not appropriate at that particular time to make that kind of a quantum leap.

10 That's basically why we didn't do it.

Q. Essentially, you based your proposal on the British Advisory Committee's recommendation?

A. Yes.

15 Q. Why didn't you accept the British Advisory's recommendations to not only place those three TWA's, but to have as low as is reasonably practicable?

A. I think that that's a very worthwhile approach that is under serious consideration within the ministry at this time.

20 Q. Did you consider as well their recommendations for essentially phasing out the use of nonessential asbestos uses?

25 A. I think that the only way I can answer that is as a result of the problem of asbestos in buidlings, there has been, as our brief to the Commission indicates, the establishment of an inter-ministerial committee to review the use of substitutes in materials, and see where it is feasible to substitute nonasbestos materials for asbestos materials, taking into account the balance of risk.

30 Q. In any of the regulations that you have done so far, have you considered cost-benefit? You have made cost-benefit considerations or studies?

A. The ministry has not carried out a cost-benefit

A. (cont'd.) analysis, no.

MISS JOLLEY: Okay.

5 Q. The last line of questioning, and I'm cutting it short because I, too, have to get going, so to speak, is about PCB's, and I would just like to ask you a couple of points for clarification following Dr. Pelmear's discussion the other day.

A. Yes.

10 Q. That is, Dr. Pelmear made a statement that perhaps some of the guidelines that the Ministry of Labour had set, not only in the criteria document that they put out for discussion - which we understood from the minister's letter himself that they were guidelines to be used to assess workers' health - they were not regulations yet, they were just for discussion, but that they were guidelines?

15 A. They were guidelines under consideration.

Q. Well, may I read what the Minister of Labour, then Minister of Labour Dr. Elgie said to us on November 24th, 1981?

20 "I wish to emphasize that the numerical values specified in the booklet are guidelines only. They have not as yet been adopted as criteria by regulation under section 20 (8) (f) of the Act, nor are they legally-enforcable limits. They are, however, intended for use in connection with the assessment of whether or not the health of workers are or may be affected by the exposure to a chemical".

25 A. Yes. And I think the operative word 'intended for use', and the intended would be limited further by the label on the front of the document that says 'for discussion only'.

30 The existing guidelines that the ministry has used for things like carbon monoxide and all the other substances

5 A. (cont'd.) in the workplace, remain the same.
What we are trying to do is to get agreement on a list of
exposure limits and such for all kinds of chemicals, in one little
book that we can say, look, this is common practice for Ontario.
That's what we are trying to do with the exposure criteria booklet,
and until there is agreement on that, the existing practices that
we have used for years in the past will continue.

10 Q. To be fair, we did perhaps misinterpret the
section, but I think to also be fair, your inspector who issued
the order based on your criteria document may also have
misinterpreted...

15 A. I think that it's fair to say that if any person
used that document, on the basis of that document wrote an
instruction to someone, he was not following orders.

Q. And that's in fact what happened, though.
The inspector did write an order based on that.

A. I will be the first to admit that that
shouldn't have happened.

20 But the guideline would have been the same if
he hadn't referred to the book.

Q. Right. And then Dr. Pelmear reassessed that
guideline.

A. There was an appeal to the order.

25 Q. Right. Now, there is still discussion on
PCB's.

A. There is most definitely discussion on PCB's.
MISS JOLLEY: Thank you. That's all the questions
I have.

DR. DUPRE: Mr. Lederer, you are batting cleanup,
are you?

30 MR. LEDERER: I'm going to do everybody a favor,
Mr. Chairman. I don't have any questions.

DR. DUPRE: Mr. Laskin?

MR. LASKIN: I don't have any questions, Mr.

5 Chairman.

DR. DUPRE: I think that leaves you, Mr. Lederer, with credit for the game-ending homerun.

Happy Dominion Day. We shall reconvene the 5th of July.

10 MR. LEDERER: Mr. Chairman, just before we adjourn, I have made a point of attempting to keep track with you on the record, of the undertaking that we've made, and if I have followed this afternoon's discussion correctly, we have added two.

15 MR. Gladstone, if I understand what you require, you require an update to Mr. McCombie's questions, of the Bendix study as referred to in the supplementary brief of the ministry, and the second one which I have is the memos of interpretations of the Act that may or may not be present within the ministry, subject to what privilege problems we may perceive having located them.

20 DR. DUPRE: Fine. Thank you.

Ten o'clock on Monday.

THE INQUIRY ADJOURNED

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THE FOREGOING WAS PREPARED
FROM THE TAPED RECORDINGS
OF THE INQUIRY PROCEEDINGS

Edwina Macht
EDWINA MACHT

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